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Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, may be found the following words and figures:

Docket Entries.

In re: A. W. Mellon v. D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania. No. 6980 Law.

March 23, 1932. Praecipe for summons in assumpsit filed. Summons issued. Summons returned served on D. B. Heiner on March 23, at Pittsburgh, Pa.

April 8, 1932. Praecipe for appearance of Louis E. Graham and John A. McCann for defendant filed.

October 23, 1933. Praecipe for appearance of D. D. Shepard for plaintiff filed.

October 24, 1933. Statement of claim filed.

August 3, 1934. Affidavit of defense filed, with acceptance of service thereon.

September 26, 1934. On motion of defendant, order entered vacating trial setting for October 4, 1934; and fixing Monday, October 29, 1934, as the date for trial.

October 22, 1934. Notice of application to file amended affidavit of defense, together with order allowing same to be filed and acceptance of service thereon.

Docket Entries.

October 26, 1934. Reply of plaintiff to new matter filed, with acceptance of service thereon.

October 29, 1934. Hearing commences before Judge Gibson.

October 30, 1934. Hearing continued.

October 31, 1934. Trial closed. Trial memo filed.

December 10, 1934. Request for findings of fact and conclusions of law filed.

February 17, 1936. Opinion, findings of fact, conclusions of law and order filed, directing that judgment be entered in favor of plaintiff and against defendant in the sum of \$202,502.22, with interest from April 1, 1927. Pursuant to above order judgment is hereby entered in favor of A. W. Mellon and against D. B. Heiner, individually and as collector, in the sum of \$202,502.22, with interest from April 1, 1927.

G. H. BERGER, *Clerk.*

April 16, 1936. On motion of defendant order entered extending time to July 1, 1936, for filing of bill of exceptions of defendant.

May 13, 1936. Notice of appeal and acceptance of service filed. Petition and order for *supersedeas* appeal. Assignment of errors filed.

May 14, 1936. Citation issued returnable June 13, 1936.

May 15, 1936. Service accepted, and citation mailed to Circuit Court of Appeals.

Docket Entries.

June 10, 1936. Stipulation filed and order entered extending date for filing transcript of record to July 10, 1936.

June 20, 1936. Stipulation filed and order entered extending time for filing bill of exceptions to August 1, 1936, extending time for filing appeal record to August 10, 1936. Stipulation filed and order entered consolidating case 6979 and 6980 Law; and agreeing that one bill of exceptions shall be sufficient.

June 30, 1936. Stipulation filed and order entered permitting the plaintiff and defendant to submit certain exhibits to the Circuit Court of Appeals.

Bill of exceptions filed by leave of Court.

Docket Entries.

In re: Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, v. D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania. No. 6979 Law.

March 23, 1932. Praeipe for summons in assumpsit filed. Summons issued. Summons returned served on D. B. Heiner on March 23, at Pittsburgh, Pa.

April 8, 1932. Praeipe for appearance of Louis E. Graham and John A. McCann for defendant filed.

Docket Entries.

October 23, 1933. Praecipe for appearance of D. D. Shepard for plaintiff filed.

October 24, 1933: Statement of Claim filed.

March 21, 1934. On petition of executors of R. B. Mellon estate order entered allowing executors to be substituted as plaintiffs in lieu of R. B. Mellon, dec'd.

August 3, 1934. Affidavit of defense filed, with acceptance of service thereon.

September 26, 1934. On motion of defendant, order entered vacating October 4, 1934, as the date for trial; and fixing October 29, 1934, as the date for trial.

October 22, 1934. Notice of application to file amended affidavit of defense together with order allowing same to be filed and acceptance of service thereon.

October 26, 1934. Reply of plaintiffs to new matter filed, with acceptance of service thereon.

October 29, 1934. Hearing before Judge Gibson.

October 30, 1934. Hearing continued.

October 31, 1934. Hearing concluded. Trial memo filed.

December 10, 1934. Request for findings of fact and conclusions of law filed.

February 17, 1936. Opinion, findings of fact and conclusions of law and order of court filed and entered directing that judgment be entered in favor of plaintiffs, Jennie K. Mellon, Richard K. Mellon, Sarah M.

Docket Entries.

Scaife and The Union Trust Company of Pittsburgh, executors of estate of R. B. Mellon, deceased, and against defendant, D. B. Heiner, individually and as former collector in the sum of \$187,787.17, with interest from May 19, 1927. Pursuant to the above order judgment is hereby entered in favor of plaintiffs and against defendant in the sum of \$187,787.17, with interest from May 19, 1927.

G. H. BERGER, Clerk.

April 16, 1936. On motion of defendant order entered extending time to July 1, 1936, to file bill of exceptions.

May 13, 1936. Notice of appeal and acceptance of service filed. Petition and order for *supersedeas* appeal. Assignment of errors filed.

May 14, 1936. Citation issued returnable June 13, 1936.

May 15, 1936. Service accepted, and citation mailed to Circuit Court of Appeals.

June 10, 1936. Stipulation filed and order entered extending time to file transcript of record to July 10, 1936.

June 20, 1936. Stipulation filed and order entered extending time for filing bill of exceptions to August 1, 1936, extending time for filing appeal record to August 10, 1936. Stipulation filed and order entered consolidating case 6979 and 6980 Law, and agreeing that one bill of exceptions shall be sufficient.

Statement of Claim.

June 30, 1936. Stipulation filed and order entered permitting the plaintiff and defendant to submit certain exhibits to the Circuit Court of Appeals.

Bill of exceptions filed by leave of Court.

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No. 6980 Law.

(Filed Oct. 24, 1933.)

Defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, is indebted to plaintiff, A. W. Mellon, in the sum of two hundred two thousand five hundred two and 22/100 dollars (\$202,502.22), with interest thereon from the first day of April, 1927, upon a cause of action whereof the following is a statement:

1. Plaintiff, A. W. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and

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has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of \$919,777.86 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	\$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of over-payment of 1917 tax)	9,650.69
December 15, 1921	229,944.48
Total	<u>\$919,777.86</u>

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$190,419.70 was disclosed.

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$190,419.70 for the year 1920 as set forth in said Commissioner's letter

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and served on plaintiff notice and demand for the payment within ten days of said sum of \$190,419.70 together with interest thereon of \$12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$190,419.70 and \$12,082.52.

8. For the reasons hereinafter stated, plaintiff was not subject to or liable for any additional tax for the year 1920. Plaintiff had, in fact, theretofore overpaid his tax by the amount of \$27,066.55 for said year, but inasmuch as claim for refund of said amount is barred by the applicable statute of limitations, no claim is made herein for said overpayment of \$27,066.55.

9. On or about December 12, 1918, plaintiff, his brother, R. B. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made part hereof and marked Exhibits "A" and "B", respectively.

10. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by

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the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

11. Immediately after the dissolution of the partnerships as aforesaid; the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships only as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D", respectively.

12. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and

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all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

15. On December 2, 1919 and during said period of liquidation from 1919 to 1925 there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

18. In his return for said year 1920, plaintiff erroneously included as taxable profit his undistributed

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share of the so-called liquidating profits of A. Overholt & Company in the amount of \$48,350.74, and his share of the so-called liquidating profits of West Overton Distilling Company in the amount of \$5,960.55 although no part of the so-called profit from the liquidation of said partnerships was received by plaintiff until final distribution in the year 1925, nor was any part of said amount available to or subject to his demand. Inasmuch as both former partnerships were in the process of liquidation the income therefrom was not taxable until liquidation payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, which did not occur until the year 1925.

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

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21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

“Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.”

“Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.”

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of \$48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This

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deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

"Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain."

24. Plaintiff agrees with the Commissioner that the profits and losses of the liquidating agent for the partnerships for each of the years 1920 to 1925, should not have been reported as taxable income or deducted as losses in the respective years, but should be taken into account in the year 1925, in determining the capital profit on final distribution in liquidation.

25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$190,419.70 tax and \$12,082.52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

Statement of Claim.

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon either as to the allowance or the disallowance thereof.

27. The said additional tax of \$190,419.70 and the interest thereon of \$12,082.52 was not due and owing to the Government of the United States. Plaintiff, in fact, overstated his taxable income on his return and overpaid his tax on the basis of said return. The income from the liquidation of the said two partnerships for the year 1920 was not taxable in that year. The said income was erroneously reported on the return and erroneously increased and included as taxable income by the Commissioner.

28. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

29. The correct computation of plaintiff's tax liability and overpayment of tax for the year 1920 is attached hereto, made part hereof and marked Exhibit "E".

30. WHEREFORE, defendant is indebted to plaintiff in the sum of two hundred two thousand five hundred two and 22/100 dollars (\$202,502.22) with interest

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thereon from the first day of April, 1927, as provided by law.

D. D. SHEPARD,
SMITH, SHAW, McCLAY & SEIFERT,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania, }
County of Allegheny. } SS. 3

Before me, the undersigned authority, a Notary Public in and for said county and commonwealth, personally appeared A. W. MELLON, who, being duly sworn according to lay, deposes and says that he has read the foregoing statement of claim and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

A. W. MELLON.

Sworn to and subscribed before me this 21st day of October, 1933.

(SEAL) M. E. CONNER,
Notary Public.

My commission expires March 11, 1937.

EXHIBIT "A".

THIS AGREEMENT

MADE the 12th day of December, 1918, between
HENRY C. FRICK, of Pittsburgh, Pa., party of the first

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part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners",

The undersigned, for many years, trading under the name of A. Overholt & Co., carried on the business of manufacturing, distilling and selling of spirituous liquors, and in the year 1907 caused to be organized a corporation (under the name of A. Overholt & Co.) to which was transferred the property and assets of said firm, the undersigned receiving capital stock of said Company, in the same proportions as their interest in said partnership, namely one-third to each; and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to re-convey and re-transfer to them as partners the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of A. Overholt & Co. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same

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proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days written notice to the others, and upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)

ANDREW W. MELLON (SEAL)

RICHARD B. MELLON (SEAL)

EXHIBIT "B".

THIS AGREEMENT

MADE the 12th day of December, 1918, between
HENRY C. FRICK, of Pittsburgh, Pa., party of the first


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part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to the "Partners".

The undersigned, in the year 1906, caused to be organized a corporation (under the name of West Overton Distilling Company), for the purpose of manufacturing, distilling and selling spirituous liquors, and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to convey and transfer to them as partners, the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of West Overton Distilling Company. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.



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Any partner may dissolve the partnership upon thirty days' written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall deem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)

ANDREW W. MELLON (SEAL)

RICHARD B. MELLON (SEAL)

EXHIBIT "C".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of A. Overholt & Co., parties of the first part; and THE UNION TRUST COMPANY OF

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PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners, trading under the firm name of A. Overholt & Co.; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of A. Overholt & Co.:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One (\$1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the

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good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effect hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND. By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts,

Statement of Claim.

demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third ($\frac{1}{3}$) to the said Andrew W. Mellon, one-third ($\frac{1}{3}$) to the said Richard B. Mellon and one-third ($\frac{1}{3}$) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it

Statement of Claim.

may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)

(Sgd.) RICHARD B. MELLON (SEAL)

Statement of Claim.

ATTEST:

(Sgd.) DE WALDT J. HICKS

(Sgd.) DE WALDT J. HICKS

THE UNION TRUST COMPANY OF
PITTSBURGH, Liquidating Agent,(Sgd.) H. C. McELDOWNEY,
President.

ATTEST:

(Sgd.) JNO. A. IRWIN,
*Secretary.*State of Pennsylvania, }
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
*Notary Public.*My commission expires:
Feb. 21st, 1923.

(N. P. SEAL)

State of Pennsylvania, }
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public

Statement of Claim.

in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
(N. P. SEAL) Notary Public.

My commission expires Feb. 21st, 1923.

RECEIVED AND RECORDED
IN U. S. PATENT OFFICE
September 1, 1925, Liber C125, page 269

THOMAS E. ROBERTSON,
Commissioner of Patents.

State of Pennsylvania, }
Fayette County. } ss.:

Recorded on this 24th day of July, A. D. 1933, in the Recorder's office of said County in Agreement Vol. 64, page 411. Given under my Hand and Seal of said Office the date above written.

(Sgd.) C. L. ARENSBERG, Recorder.

Statement of Claim.

EXHIBIT "D".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of West Overton Distilling Company, parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, part of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners trading under the firm name of West Overton Distilling Company; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of West Overton Distilling Company;

Now, THEREFORE, THIS AGREEMENT WITNESSETH:
That said parties of the first part, in consideration of

Statement of Claim.

the premises and of the sum of One (\$1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

Statement of Claim.

SECOND. By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third ($\frac{1}{3}$) to the said Andrew W. Mellon, one-third ($\frac{1}{3}$) to the said Richard B. Mellon and one-third ($\frac{1}{3}$) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said

Statement of Claim.

parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint

Statement of Claim.

JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)

(Sgd.) RICHARD B. MELLON (SEAL)

ATTEST:

(Sgd.) DEWALDT J. HICKS

(Sgd.) DEWALDT J. HICKS

THE UNION TRUST COMPANY OF PITTSBURGH,

Liquidating Agent,

By (Sgd.) H. C. McELDOWNEY,

President.

ATTEST:

(Sgd.) JNO. A. IRWIN,

Secretary

State of Pennsylvania, }
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law ac-

Statement of Claim.

knowledgeed the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DEWALDT J. HICKS,
Notary Public.
 (N. P. Seal)

My commission expires Feb. 21st, 1923.

State of Pennsylvania, }
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.

My commission expires Feb. 21st, 1923.

Commonwealth of Pennsylvania, }
County of Westmoreland. } ss.:

Recorded on this 8th day of June, A. D. 1923, in the Recorder's Office of said County in Deed Book, Vol. 718, page 531.

Statement of Claim.

Given under my Hand and the Seal of the said Office the day and year aforesaid.

(Sgd.) HARRY S. MILLER,
(SEAL) Recorder.

EXHIBIT "E"

Net income for 1920 as shown by Commissioner's letter dated February 21, 1927 ..		\$1,813,876.62
Less: Income erroneously included as taxable by Commissioner:		
A. Overholt & Co.	\$281,779.95	
West Overton Distilling Co.	52,814.28	334,594.23
		<hr/>
Correct net income		\$1,479,282.39
Not subject to normal tax as credits exceed the net income.		
Surtax on \$1,000,000.00 graduated	\$583,510.00	
Surtax on \$479,282.39 @ 65%	311,533.55	
		<hr/>
	\$895,043.55	
Less tax paid at source	2,332.24	
		<hr/>
Correct tax liability	\$892,711.31	

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Tax paid:

With return . \$919,777.86

Additional tax 190,419.70 \$1,110,197.56

Over paid\$ 217,486.25

Barred by statute of limita-
tions 27,066.55

Tax refundable\$ 190,419.70

Interest paid 12,082.52

Amount of plaintiff's claim \$ 202,502.22

Statement of Claim.

No. 6979 Law.

(Filed Oct. 24, 1933.)

Defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, is indebted to plaintiff, R. B. Mellon, in the sum of one hundred eighty-seven thousand seven hundred eighty-seven and 17/100 dollars (\$187,787.17), with interest thereon from the nineteenth day of May, 1927, upon a cause of action whereof the following is a statement:

1. Plaintiff, R. B. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was insti-

Statement of Claim.

tuted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and his filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of \$406,673.28 shown by said return to be due to the Government of the United States as follows:

March 15, 1921\$101,668.32

June 15, 1921 101,668.32

September 15, 1921 101,668.32

December 15, 1921 101,668.32

Total\$406,673.28

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$175,-259.70 was disclosed.

Statement of Claim.

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$175,259.70 together with interest thereon of \$12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made, within the specified ten days' time.

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$175,259.70 and \$12,527.47.

8. For the reasons hereinafter stated, plaintiff was not subject to or liable for any additional tax for the year 1920. Plaintiff had, in fact, theretofore overpaid his tax by the amount of \$38,952.14 for said year, but inasmuch as claim for refund of said amount is barred by the applicable statute of limitations, no claim is made herein for said overpayment of \$38,952.14.

9. On or about December 12, 1918, plaintiff, his brother, A. W. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partner-

Statement of Claim.

ship agreements are attached hereto, made part thereof and marked Exhibits "A" and "B", respectively.

10. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

11. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships only as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D", respectively.

12. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the

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surviving partners and the estate of the deceased partner in the year 1925.

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating agents, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

15. On December 2, 1919 and during said period of liquidation from 1919 to 1925 there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and

Statement of Claim.

West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

18. In his return for said year 1920, plaintiff erroneously included as taxable profit his undistributed share of the so-called liquidating profits of A. Overholt & Company in the amount of \$48,350.74, and his share of the so-called liquidating profits of West Overton Distilling Company in the amount of \$5,960.55 although no part of the so-called profit from the liquidation of said partnerships was received by plaintiff until final distribution in the year 1925, nor was any part of said amount available to or subject to his demand. Inasmuch as both former partnerships were in the process of liquidation the income therefrom was not taxable until liquidation payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, which did not occur until the year 1925.

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously

Statement of Claim.

eously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

“Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.”

“Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.”

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

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23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of \$41,008.84 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessments for that year was based, giving the following explanation:

"Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain."

24. Plaintiff agrees with the Commissioner that the profits and losses of the liquidating agent for the partnerships for each of the years 1920 to 1925 should not have been reported as taxable income or deducted as losses in the respective years, but should be taken into account in the year 1925, in determining the capital profit on final distribution in liquidation.

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25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$175,259.70 and \$12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon either as to the allowance or the disallowance thereof.

27. The said additional tax of \$175,259.70 and the interest thereon of \$12,527.47 was not due and owing to the Government of the United States. Plaintiff, in fact, overstated his taxable income on his return and overpaid his tax on the basis of said return. The income from the liquidation of the said two partnerships for the year 1920 was not taxable in that year. The said income was erroneously reported on the return and erroneously increased and included as taxable income by the Commissioner.

28. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for the year 1925. He has assessed and collected a tax on the same income in each of said years.

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29. The correct computation of plaintiff's tax liability and overpayment of tax for the year 1920 is attached hereto, made part hereof and marked Exhibit "E".

30. WHEREFORE, defendant is indebted to plaintiff in the sum of one hundred eighty-seven thousand seven hundred eighty-seven and 17/100 dollars (\$187,787.17) with interest thereon from the nineteenth day of May, 1927, as provided by law.

D. D. SHEPARD,
SMITH, SHAW, McCLAY & SEIFERT,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said county and commonwealth, personally appeared R. B. MELLON, who, being duly sworn according to law, deposes and says that he has read the foregoing statement of claim and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

R. B. MELLON.

Sworn to and subscribed before me this 23rd day of October, 1933.

P. J. HYLAND,
Notary Public.

(SEAL)

My Commission expires June 27, 1936.

Statement of Claim.

EXHIBIT "A"

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners",

The undersigned, for many years, trading under the name of A. Overholt & Co., carried on the business of manufacturing, distilling and selling of spirituous liquors, and in the year 1907 caused to be organized a corporation (under the name of A. Overholt & Co.) to which was transferred the property and assets of said firm, the undersigned receiving capital stock of said Company in the same proportions as their interest in said partnership, namely one-third to each; and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to re-convey and re-transfer to them as partners the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of A.

Statement of Claim.

Overholt & Co. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRIOK (SEAL)

ANDREW W. MELLON (SEAL)

RICHARD B. MELLON (SEAL)

Statement of Claim.

EXHIBIT "B".

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners."

The undersigned, in the year 1906, caused to be organized a corporation (under the name of West Overton Distilling Company), for the purpose of manufacturing, distilling and selling spirituous liquors, and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to convey and transfer to them as partners, the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing distilling and selling of spirituous liquors, and shall do business under the name of West Overton Distilling Company. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in what-

Statement of Claim.

ever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days' written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)

ANDREW W. MELLON (SEAL)

RICHARD B. MELLON (SEAL)

Statement of Claim.

EXHIBIT "C".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of A. Overholt & Co., parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners, trading under the firm name of A. Overholt & Co.; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of A. Overholt & Co.:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One (\$1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby

Statement of Claim.

grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND: By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

Statement of Claim.

THIRD: By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third ($\frac{1}{3}$) to the said Andrew W. Mellon, one-third ($\frac{1}{3}$) to the said Richard B. Mellon and one-third ($\frac{1}{3}$) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH: And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

Statement of Claim.

FIFTH: It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH: The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgement, to the intent that the same may be duly recorded.

WITNESS the due execution hereof. the day and year aforesaid.

(Sgd.) ANDREW W. MELLON. (SEAL)

(Sgd.) RICHARD B. MELLON. (SEAL)

Statement of Claim.

ATTEST:

(Sgd.) DE WALDT J. HICKS.

(Sgd.) DE WALDT J. HICKS.

THE UNION TRUST COMPANY OF PITTSBURGH,
Liquidating Agent.

(Sgd.) H. C. McELDOWNEY,
President.

ATTEST:

(Sgd.) JNO. A. IRWIN,
Secretary.

State of Pennsylvania, }
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,

Notary Public,
(N. P. SEAL)

My commission expires Feb. 21st, 1923.

Statement of Claim.

State of Pennsylvania, }
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.
 (N. P. SEAL)

My commission expires Feb. 21st, 1923.

RECEIVED AND RECORDED
 IN U. S. PATENT OFFICE

September 1, 1925, Liber C125, page 269

THOMAS E. ROBERTSON,
Commissioner of Patents.

State of Pennsylvania, }
Fayette County. } ss.:

Recorded on this 24th day of July, A. D. 1933, in the Recorder's office of said County in Agreement Vol. 64, page 411. Given under my Hand and Seal of said Office the date above written.

(Sgd.) C. L. ARENSBERG,
Recorder.

Statement of Claim.

EXHIBIT "D"

ARTICLES OF AGREEMENT.

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania; surviving partners under the firm of West Overton Distilling Company, parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners trading under the firm name of West Overton Distilling Company; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of West Overton Distilling Company:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One (\$1.00) Dollar to

Statement of Claim.

them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

To HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND. By and with the proceeds of such sales and collections the said party of the second part shall

Statement of Claim.

first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third ($\frac{1}{3}$) to the said Andrew W. Mellon, one-third ($\frac{1}{3}$) to the said Richard B. Mellon and one-third ($\frac{1}{3}$) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable; of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full

Statement of Claim.

power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to

Statement of Claim.

take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)

(Sgd.) RICHARD B. MELLON (SEAL)

ATTEST:

(Sgd.) DEWALDT J. HICKS

(Sgd.) DEWALDT J. HICKS

THE UNION TRUST COMPANY OF PITTSBURGH,
Liquidating Agent.

By (Sgd.) H. C. McELDOWNEY,
President.

ATTEST:

(Sgd.) JNO. A. IRWIN,
Secretary.

State of Pennsylvania, }
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DEWALDT J. HICKS,

Notary Public,

(N. P. SEAL).

My Commission expires: Feb. 21st, 1923.

Statement of Claim.

State of Pennsylvania, }
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.

My Commission expires: February 21st, 1923.

Commonwealth of Pennsylvania, }
County of Westmoreland. } ss.:

(SEAL)

Recorded on this 8th day of June, A. D. 1923, in the Recorder's Office of said County in Deed Book, Vol. 718, page 531.

Given under my Hand and the Seal of the said Office the day and year aforesaid.

(Sgd.) HARRY S. MILLER,
Recorder.

EXHIBIT "E"

Net income for 1920 as shown
 by Commissioner's letter
 dated February 21, 1927...

\$1,000,459.28

Statement of Claim.

Less: Income erroneously included as taxable by Commissioner:		
A. Overholt & Co.	\$281,779.95	
West Overton Distilling Co.	52,814.28	334,594.23
		<hr/>
Correct net income		\$ 665,865.05
Not subject to normal tax as credits exceed the net income.		
Surtax on \$500,000.00 graduated	\$263,510.00	
on \$165,865.05 @ 64%	106,153.63	
		<hr/>
	\$369,663.63	
Less tax paid at source	1,942.49	
		<hr/>
Correct tax liability	\$367,721.14	
Tax paid:		
With return ..	\$406,673.28	
Additional tax ..	175,259.70	\$581,932.98
		<hr/>
Overpaid	\$214,211.84	
Barred by statute of limitations	38,952.14	
		<hr/>
Tax refundable	\$175,259.70	
Interest paid	12,527.47	
		<hr/>
Amount of plaintiff's claim..	\$187,787.17	

*Suggestion of Death and Motion for Substitution of
Executors.*

**Suggestion of Death and Motion for Substitution
of Executors.**

No. 6979 Law.

(Filed Mar. 21, 1934.)

To the Honorable the Judges of said Court:

AND NOW, this 21st day of March, 1934, come Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, deceased, by their counsel, Smith, Shaw, McClay and Seifert, Esqs., and suggest to your Honorable Court that the plaintiff in the above entitled action, R. B. Mellon, died December 1, 1933; that Letters Testamentary in the Estate of said R. B. Mellon were duly granted to them by the Register of Wills of Allegheny County, Pa., on the 8th day of December, 1933, as appears by short certificate hereto attached; and that at the time of the death of said R. B. Mellon the above entitled action by him against D. B. Heiner, individually and as Collector of Internal Revenue for the 23rd District of Pennsylvania, was pending in this court.

WHEREFORE the said Executors of the Estate of R. B. Mellon, deceased, respectfully move your Honorable Court that they may be substituted as plaintiffs in the above entitled action in place of said R. B. Mellon.

WILLIAM A. SEIFERT,
SMITH, SHAW, McCLAY & SEIFERT,
*Counsel for Jennie King Mellon,
Richard King Mellon, Sarah Mel-
lon Scaife and The Union Trust
Company of Pittsburgh, Executors.*

*Suggestion of Death and Motion for Substitution of
Executors.*

ORDER.

AND Now, this 21st day of March, 1934, the foregoing suggestion of death and motion for substitution having been duly presented in open court, upon consideration thereof it is ordered; adjudged and decreed that Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, deceased, be and hereby they are substituted as plaintiffs in the above entitled action in lieu of plaintiff R. B. Mellon, deceased.

BY THE COURT,

GIBSON,

Judge.

Commonwealth of Pennsylvania, }
Allegheny County. } ss.:

No. 4362

I, JOSEPH N. MACKRELL, Register for the Probate of Wills and Granting Letters of Administration in and for the County aforesaid, Do HEREBY CERTIFY That, at Pittsburgh on the 8th day of December, in the year of our Lord one thousand nine hundred and Thirty-three, Letters Testamentary on the estate of Richard B. Mellon, late of Pittsburgh in said County, deceased, were duly granted unto Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, who took and subscribed

*Notice of Application to File Amended Affidavit
of Defense.*

the oath of office prescribed by law; and that said Letters Testamentary continue in full force and effect.

THEREFORE, all faith and credit are of right due and ought to be paid to all their lawful acts as such Executor throughout the United States and elsewhere.

Given under my hand and seal of office, at Pittsburgh, this 10th day of February in the year of our Lord one thousand nine hundred and thirty-four.

JOSEPH N. MACKRELL,

(SEAL)

Register.

**Notice of Application to File Amended Affidavit
of Defense.**

No. 6980 Law.

To: A. W. MELLON,
and/or his attorneys,

SMITH, SHAW, McCLAY and SEIFERT,
747 Union Trust Building:

You, and each of you, will please take notice that at the opening of court on Monday, October 22, 1934, or as soon thereafter as the matter can be heard, the defendant, by his attorneys, will move the court for permission to file the attached Amended Affidavit of

*Application for Leave to File Amended Affidavit of
Defense.*

Defense in this cause and for an order that it be considered as the Affidavit of Defense herein.

HORATIO S. DUMBAULD,
*United States Attorney for the
Western District of Pennsylvania.*
D. LLOYD CLAYCOMB,
*Assistant United State Attorney,
Attorneys for the Defendant.*

**Application for Leave to File Amended Affidavit
of Defense.**

No. 6980 Law.

Comes now D. B. Heiner, defendant above named, by his attorneys, and respectfully moves the Court for permission to file in this cause the attached Amended Affidavit of Defense.

Respectfully submitted,

HORATIO S. DUMBAULD,
*United States Attorney for the
Western District of Pennsylvania.*
D. LLOYD CLAYCOMB,
*Assistant United States Attorney,
Attorneys for the Defendant.*

ORDER.

This matter coming on to be heard this 22nd day of October, 1934, it is ordered that the attached Amend-

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Amended Affidavit of Defense.

ed Affidavit of Defense be filed in this cause and be considered as the Affidavit of Defense herein.

PER CURIAM,

G.

Amended Affidavit of Defense.

No. 6980 Law.

(Filed Oct. 15, 1934.)

Comes now D. B. Heiner, defendant above named, and alleges that he has just, true and legal defenses to the allegations contained in the Statement of Claim. The nature of the defenses is as follows:

FIRST DEFENSE

1. The allegations contained in Paragraph "1" of the Statement of Claim are admitted.

2. The allegations contained in Paragraph "2" of the Statement of Claim are admitted.

3. The allegations contained in Paragraph "3" of the Statement of Claim are admitted.

4. The allegations contained in Paragraph "4" of the Statement of Claim are admitted, except that the payment therein alleged to have been made on June 15, 1921, was in fact made on June 17, 1921; the payment therein alleged to have been made on September 15, 1921, was in fact made on September 19, 1921; and the payment therein alleged to have been made on December 15, 1921, was in fact made on December 17,

Amended Affidavit of Defense.

1921, and the credit therein alleged to have been made on September 15, 1921, was in fact made on May 17, 1922.

5. The allegations contained in Paragraph "5" of the Statement of Claim are admitted.

6. The allegations contained in Paragraph "6" of the Statement of Claim are admitted.

7. The allegations contained in Paragraph "7" of the Statement of Claim are admitted, except that the payment therein described was made on April 2, 1927, and not on April 1, 1927.

8. In answer to the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that for the reasons stated in the Statement of Claim, or for any other reasons, the plaintiff was not subject to or liable for any additional tax for the year 1920. On the contrary, defendant alleges that the additional taxes and interest described in Paragraph "7" of the Statement of Claim were just, due and owing to the United States, and correctly assessed and collected.

Further answering the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that the plaintiff had in fact overpaid his tax by the amount of \$27,066.55 for said year, and, on the contrary, alleges that no overpayment whatsoever was made by the plaintiff of his tax for the said year 1920.

9. The allegations contained in Paragraph "9" of the Statement of Claim are admitted.

Amended Affidavit of Defense.

10. In answer to the allegations contained in Paragraph "10" of the Statement of Claim, defendant admits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between the plaintiff and Richard B. Mellon, or between said parties and the personal representatives of Henry C. Frick.

Further answering the allegations contained in Paragraph "10" of the Statement of Claim, defendant avers and alleges that the two partnerships of "A. Overholt & Company" and "West Overton Distilling Company" were not terminated by the death of Henry C. Frick, but continued in existence until the winding up of their affairs was completed subsequent to the year 1920. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "10" of the Statement of Claim are denied.

11. In answer to the allegations contained in Paragraph "11" of the Statement of Claim, defendant denies that plaintiff and Richard B. Mellon began the liquidation of the two partnerships immediately after December 2, 1919, and denies that during the period from December 2, 1919, until January 31, 1921, the plaintiff and Richard B. Mellon acted in respect of the assets and businesses of said partnerships as liquidating trustees. On the contrary, defendant alleges that throughout the year 1920, the businesses of the aforesaid two partnerships were actively carried on and continued in the ordinary and usual manner.

Amended Affidavit of Defense.

Further answering the allegations contained in Paragraph "11" of the Statement of Claim, defendant admits the making of the two agreements, copies of which are attached to the Statement of Claim as Exhibits "C" and "D", respectively, but denies the materiality thereof to any issue involved in this suit.

12. In answer to the allegations contained in Paragraph "12" of the Statement of Claim, defendant denies the allegations contained therein, and alleges that the books and records in respect to the business and activities of said partnerships and each of them for the year 1920, which is the only year material to this suit, were kept by the accrual method of accounting.

13. In answer to the allegations contained in Paragraph "13" of the Statement of Claim, defendant admits that in the year 1925 the property and assets then owned by said two partnerships were distributed to the plaintiff, and Richard B. Mellon and the estate of Henry C. Frick. Except as hereinabove admitted, defendant denies the allegations in said paragraph contained.

14. In answer to the allegations contained in Paragraph "14" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including the year 1925 neither the plaintiff, his brother Richard B. Mellon, nor the Union Trust Company of Pittsburgh engaged in the business of distilling spirituous liquors, and admits that all sales of spirituous liquors made by or on behalf of the said

Amended Affidavit of Defense.

partnerships of A. Overholt & Company and West Overton Distilling Company during said period were made in compliance with the existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "14" of the Statement of Claim are denied.

15. Defendant denies the allegations contained in Paragraph "15" of the Statement of Claim and alleges that during the period from December 2, 1919, to and including December 31, 1920, there were no debts and/or contingent liabilities of substantial amount outstanding against the partnerships of A. Overholt & Company and West Overton Distilling Company, or either of them. Defendant further alleges that distributions of assets of said partnerships could have been made during said period.

16. In answer to the allegations contained in Paragraph "16" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including December 31, 1920, the assets of the partnerships of A. Overholt & Company and West Overton Distilling Company, including cash, were kept separately and were not commingled with the assets or cash of the plaintiff and/or Richard B. Mellon. Except as hereinbefore admitted, the allegations contained in Paragraph "16" of the Statement of Claim are denied.

17. In answer to the allegations contained in Paragraph "17" of the Statement of Claim, defend-

Amended Affidavit of Defense.

ant alleges that said allegations are irrelevant and immaterial to any issue of law or fact involved in this proceeding and constitute an attempt to inject into the proceeding impertinent matters; therefore, defendant neither admits nor denies the same. Defendant further alleges that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal income tax liability of the estate of Henry C. Frick for the years 1920 and 1925 or for any year neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or upon his behalf.

18. In answer to the allegations contained in Paragraph "18" of the Statement of Claim, defendant admits that in his return for the year 1920 the plaintiff included the sum of \$48,350.74 as income from the partnership of A. Overholt & Company, and included the sum of \$5,960.55 as income from the partnership of West Overton Distilling Company. Defendant denies that any part of the said sums should not have been included as taxable income in plaintiff's return for the year 1920, and on the contrary alleges that the entire income of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920 was taxable to the plaintiff and to the parties interested in said partnerships, as provided in Section 218 of the Revenue Act of 1918. Defendant denies that said sums, or either of them, were "so-called liquidating profits", and on the contrary alleges that said sums were part of the operating income earned by said partnerships in the ordinary course of

Amended Affidavit of Defense.

business. Defendant denies that no part of said sums was received by plaintiff until the year 1925, and denies that no part thereof was available to or subject to plaintiff's demand, and on the contrary alleges that said sums were either received by the plaintiff during the year 1920, or were in all respects the property of the plaintiff available to him and subject to his disposition during said year. Defendant denies that no part of the profits from the liquidation of said partnerships was received by plaintiff until the year 1925, and denies that no part thereof was available to or subject to plaintiff's demand, and on the contrary alleges that a substantial part of said profits was either received by plaintiff prior to said year or was in all respects the property of the plaintiff and available to him and subject to his disposition prior to said year. Defendant denies that said partnerships were in process of liquidation in the year 1920, and on the contrary alleges that the businesses of said partnerships were carried on in the ordinary and usual manner throughout said year of 1920. Defendant denies that the income from said partnerships was not taxable until the liquidating payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary, alleges that said partnerships were required to file partnership returns for the year 1920 in accordance with the provisions of Section 224 of the Revenue Act of 1918, and under the provisions of Section 218 of the said Revenue Act of 1918, plaintiff's distributive share of the net income of each of said part-

Amended Affidavit of Defense.

nerships for the year 1920 represented taxable income to him for said year. Defendant denies that payments received by plaintiff from said partnerships prior to the year 1925 did not exceed the cost to him or the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary alleges that the payments received by the plaintiff prior to the year 1925 from each of the aforesaid partnerships exceeded the cost to him of his interest in the partnership assets.

19. In answer to the allegations contained in Paragraph "19" of the Statement of Claim, the defendant admits that the Commissioner increased plaintiff's share of the net income of A. Overholt & Company for the year 1920 from \$48,350.74 to \$281,779.95, and increased plaintiff's share of the net income of West Overton Distilling Company for the year 1920 from \$5,960.55 as reported on the return to \$52,814.28. Further answering, defendant alleges that the aforesaid amounts of \$281,779.95 and \$52,814.28, respectively, were plaintiff's distributive shares of the net income earned by each of said partnerships during the year 1920 in the ordinary course of business and were computed by the Commissioner on the basis of the partnership returns and the books and records of said partnerships for the year 1920, as shown below:

A. Overholt & Company

Gross Income

Whiskey sales, not less than . .	\$ 928,273.71
----------------------------------	---------------

Amended Affidavit of Defense.

Less: January 1, 1920 whiskey
inventory\$794,235.38
December 31, 1920 whis-
key inventory 697,307.34 96,928.04

Gross profit on whiskey sales 831,345.67
Sales of empty barrels, not
less than 6,609.31
Charges for bottling and cas-
ing, not less than 320,533.61
Storage charges, not less than 42,550.50
Other operating income not al-
located 33,578.67
Interest received 3,480.73
Rents received 300.00

Total\$1,238,398.49

Deductions

Salaries and wages 39,600.01
Insurance 18,190.00
Taxes 31,132.86
Storage expense 23,446.60
Bottling expense 22,867.98
Distilling expense 46,311.27
General expense 35,912.08
Expenses of Bradford office .. 3,519.59
Cases, bottles, corks, other
supplies and misc. 166,749.49
Loss on Liberty Bonds 5,328.75

Total 393,058.63

Net income \$ 845,339.86

Plaintiff
tive s

Sales le
Less: In
19
In
19

Total .

Labor .
Taxes .
Depreci
Loss on
Storage
Insuran
Other c
etc. .
Salesme

Total ..

Net inc
Plaintiff
tive s

20.

Paragra
alleges t
vant to

Amended Affidavit of Defense.

s one-third distribu-		
are		281,779.95
<i>West Overton Distilling Company</i>		
<i>Gross Income</i>		
returns	\$	218,050.31
Inventory December 1,		
9	\$121,135.00	
Inventory December 31,		
0	93,819.44	27,315.56
	\$	190,734.75
<i>Deductions</i>		
.....	\$	8,188.92
.....		2,236.44
ion		1,739.49
Liberty Bonds		507.50
.....		1,211.40
.....		5,528.16
Expenses—Bad debts,		
.....		11,650.00
's commissions		1,230.00
		32,291.91
ne	\$	158,442.84
s one-third distribu-		
are	\$	52,814.28

In answer to the allegations contained in
 h "20" of the Statement of Claim, defendant
 at said allegations are immaterial and irrele-
 ny issue of law or fact involved in this pro-

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ceeding, and, therefore, defendant neither admits nor denies the same. Defendant further alleges that any action taken by the plaintiff on or in connection with his income tax returns for the years 1921 to 1925, inclusive, cannot operate to preclude correct action as to the issues herein involved. Defendant further alleges that the plaintiff was taxable on his distributive share of the income of said partnerships, whether distributed or not.

21. In answer to the allegations contained in Paragraph "21" of the Statement of Claim, defendant alleges that it is entirely immaterial and irrelevant to any issue of fact or law involved in this action whether the Commissioner of Internal Revenue did or did not eliminate any profit or loss reported by plaintiff on his income tax return for the year 1924. Any action taken by the Commissioner in respect of said return neither operates to preclude correct action as to the issues herein involved nor as admissions against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "21" of the Statement of Claim, the defendant alleges that the Commissioner's final audit of the plaintiff's income tax return for the year 1924 showed an overassessment for said year in the amount of \$16,982.12, and alleges that in determining said overassessment, the Commissioner did not eliminate from plaintiff's income tax return an amount of \$8,202.09 reported thereon as plaintiff's distributive share of the income of "A. Overholt & Co.", and did not eliminate therefrom an amount of

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\$7,644.40 deducted on said return as plaintiff's proportionate share of an operating loss sustained by the "West Overton Dist. Co.", during the said year.


22. In answer to the allegations contained in Paragraph "22" of the Statement of Claim, defendant alleges that any action which the Commissioner of Internal Revenue may have taken in determining the profit realized by the plaintiff in the year 1925 on the liquidation of the partnerships of A. Overholt & Company and West Overton Distilling Company is immaterial and irrelevant to any issue involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "22" of the Statement of Claim, defendant denies that the amount actually received by the plaintiff in the year 1925 in liquidation of his investment in said partnerships included the profits and losses of the partnerships for all or any prior years.

23. In answer to the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that it is entirely immaterial to any issue of fact or law involved in this proceeding what course the Commissioner of Internal Revenue may have taken in regard to the determination of a deficiency in income tax for the year 1925 against the plaintiff and as to the assessment or collection thereof. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf.

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Further answering the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that on or about June 13, 1932, within the time provided by law, the plaintiff, A. W. Mellon, filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania at Pittsburgh, Pennsylvania, a claim for refund of income tax for the year 1925, claiming a refund of the full amount of the sum of \$48,906.45 assessed and collected as a deficiency for said year, and alleges that said claim for refund is based in part on the alleged inclusion in income for the year 1925 of the operating net income of the aforesaid partnerships for the year 1920, and that said claim for refund for 1925 is pending undisposed of by the Commissioner of Internal Revenue.

24. In answer to the allegations of fact or law, if any, contained in Paragraph "24" of the Statement of Claim, the defendant denies the same. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue other than for the year 1920 is immaterial and irrelevant to any issue of fact or law involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by the defendant or on his behalf. Defendant further alleges that by reason of the pendency of the claim for refund for the year 1925, final action has not been taken by the Commissioner of Internal Revenue in regard to said year. Defendant further alleges that the Commissioner of Internal Revenue by his action in assessing and collecting the taxes involved in this ac-



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tion and by his rejection of the claim for refund for the year 1920, as hereinafter alleged, has duly determined that during the year 1920 the partnerships of A. Overholt & Company and West Overton Distilling Company realized and received income taxable, whether distributed or not, to the plaintiff and the other parties interested therein. Defendant further alleges that in letters dated April 16, 1932, February 27, 1934, and April 6, 1934, to plaintiff, the Commissioner held that plaintiff's distributive share of the net income for the year 1920 of the partnerships of A. Overholt & Company and West Overton Distilling Company was "properly reportable on your 1920 return."

25. In answer to the allegations contained in Paragraph "25" of the Statement of Claim, defendant admits that on or about March 19, 1929, plaintiff filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose, a claim for refund of \$194,160.75, for the year 1920. Defendant denies the remaining allegations in said Paragraph "25", and alleges that in said refund claim plaintiff assigned the following reasons for the allowance thereof:

In my tax return for 1920 there was included in my income the amounts of \$48,350.74 and \$5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to \$281,779.95 and \$52,814.28, respectively, and assessed and collected

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additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added or subtracted from the partners' individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of \$281,779.95 and \$52,814.28, erroneously included by the Commissioner in income for that year.

26. In answer to the allegations contained in Paragraph "26" of the Statement of Claim, defendant admits that the allegations therein contained were true at the time of the filing of the praecipe for summons in the instant cause on March 23, 1932. Defendant alleges, however, that by letter dated April 16, 1932, the Commissioner of Internal Revenue advised the plaintiff that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of the above mentioned partnerships was reportable in the year in which the income was realized. Said letter dated April 16, 1932, further advised the plaintiff that he would be afforded a hearing in the Income Tax Unit at Washington upon

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written request therefor. Plaintiff through counsel was afforded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter, by letter dated February 27, 1934, plaintiff was advised of the Commissioner's determination with respect to his aforesaid claim for refund for the year 1920 as follows:

Your claim for refund of \$194,160.75, income taxes for the taxable year 1920, has been examined.

Your claim is based on the statement that amounts of \$281,779.95 and \$52,814.28 were included in taxable income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.

Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at the conference held in Washington, D. C., October 12, 1932 and this office holds that your proportionate share of the operating profits of the above-mentioned partnerships was properly reportable on your 1920 return.

Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932 official notice of the disallowance of the claim will be issued by registered mail.

A copy of this letter is being forwarded to your representative, Mr. William A. Seifert, in accordance with the authority conferred upon him in your power of attorney on file with the Bureau.

Amended Affidavit of Defense.

Plaintiff's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was sent by registered mail under date of April 6, 1934.

27. In answer to the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that the said additional tax of \$190,419.70, and the interest thereon of \$12,082.52, was not due and owing to the Government of the United States, and, on the contrary, alleges that said tax and said interest were due and owing and were justly collected. Further answering the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that plaintiff overstated his taxable income in his return, and denies that he overpaid his tax on the basis of said return. On the contrary, defendant alleges that said income was understated on the return, and that all payments made on said tax were due and owing to the United States, and were justly and correctly paid. Further answering the allegations contained in Paragraph "27", defendant denies that the income from the said two partnerships, during the year 1920, was not taxable in that year, and, on the contrary, alleges that it was subject to income tax and that the taxes heretofore assessed and collected thereon and in controversy in this action, were in all respects justly and correctly assessed and collected. Further answering the allegations contained in Paragraph "27", de-

Amended Affidavit of Defense.

fendant denies that the said income was erroneously reported on the return, erroneously increased, and/or erroneously included as taxable income by the Commissioner. On the contrary, defendant alleges that the said income was reported in part on the return, the correct increases were made by the Commissioner of Internal Revenue, and both the original amount reported and the amount of increase were justly and correctly included as taxable income by the Commissioner.

28. In answer to the allegations contained in Paragraph "28" of the Statement of Claim, defendant admits that the Commissioner of Internal Revenue has included in plaintiff's income for the year 1920 the sums of \$281,779.95 and \$52,814.28. Defendant denies, however, that said sums were liquidating profits of A. Overholt & Company and West Overton Distilling Company, but, on the contrary, alleges that said sums represent plaintiff's one-third distributive share of the operating income and profits of the aforesaid partnerships of A. Overholt & Company and West 1920. Defendant alleges, however, that any action Overton Distilling Company, respectively, for the year taken by the Commissioner of Internal Revenue with respect to plaintiff's income tax liability for the year 1925 is wholly immaterial and irrelevant to any issue involved in this proceeding, and any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Defendant further alleges that the Commissioner of Internal Rev-

Amended Affidavit of Defense.

enue has not taken final action with respect to plaintiff's income tax liability for the year 1925. Defendant admits that the Commissioner of Internal Revenue assessed and defendant collected the tax for the year 1920 based upon a net income which included the aforesaid sums of \$281,779.95 and \$52,814.28. Defendant alleges, however, that the Commissioner of Internal Revenue has not taken final action with respect to plaintiff's income tax liability for the year 1925, and that if tax has been collected on the same income for each of the years 1920 and 1925, proper adjustment can be made by action on plaintiff's refund claim for the year 1925.

29. In answer to the allegations contained in Paragraph "29" of the Statement of Claim, defendant denies that the computation set forth in Exhibit "E" attached to the Statement of Claim is a correct computation of plaintiff's income tax liability for the year 1920, and denies that plaintiff overpaid his income tax for said year. On the contrary, defendant alleges that the plaintiff's income tax liability for the year 1920 was correctly determined by the Commissioner of Internal Revenue, and that said taxes and the interest thereon were duly and legally assessed by the Commissioner of Internal Revenue and collected by the defendant.

30. In answer to the allegations contained in Paragraph "30" of the Statement of Claim, defendant denies that he is indebted to the plaintiff in the sum of \$202,502.22 with interest thereon from April 1, 1927,

Amended Affidavit of Defense.

provided by law, and defendant denies that he is indebted to the plaintiff in any sum whatsoever. Defendant owes plaintiff nothing.

NEW MATTER.**SECOND DEFENSE.**

For a further and second defense to plaintiff's statement of Claim, the defendant, although fully relying on the defenses hereinabove set forth, alleges that the plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust, and is further estopped to assert and claim that such income was not distributed or distributable to the plaintiff if such a trust or trusts existed, and as such not taxable to plaintiff, in that:

1. On or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and represented that A. Overholt & Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to the plaintiff, Andrew Mellon, his brother, Richard B. Mellon, and the estate of Henry C. Frick.

Amended Affidavit of Defense.

2. Neither Richard B. Mellon nor the plaintiff, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust.

3. In examining the partnership return filed in the name of and for A. Overholt & Company and the income tax return filed by the plaintiff for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of A. Overholt & Company, and merely changed the amount of the income so reported.

4. Plaintiff first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of plaintiff's claim for refund for the year 1920, and more than six years after March 15, 1921.

5. On or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and represented that West Overton Distilling Company was a partnership and that the income thereof for the year

Amended Affidavit of Defense.

20 was distributable and taxable, one-third each, to the plaintiff, Andrew W. Mellon, his brother, Richard B. Mellon, and the estate of Henry C. Frick.

6. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns for fiduciaries of a trust.

7. In examining the partnership return filed in the name of and for West Overton Distilling Company and the income tax return filed by the plaintiff for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of West Overton Distilling Company, and merely changed the amount of the income so reported.

8. Plaintiff first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of plaintiff's claim for refund for the year 1920, and more than six years after March 15, 1921.

9. If the income of A. Overholt & Company for the calendar year 1920 had been treated and reported by plaintiff and his brother, Richard B. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been \$51,914.70, computed as follows:

Amended Affidavit of Defense.

Net income as determined by the Commissioner, as set forth in Para. 19 hereof ..\$845,339.86

Less: Exemption 1,000.00

Income subject to normal tax\$844,339.86

Normal tax at 4% on \$4,000 ..\$ 160.00

Normal tax at 8% on
\$840,339.86 67,227.19

Surtax on \$845,339.86 484,527.51

Total tax liability\$551,914.70

10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and his brother, Richard B. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been \$66,673.42, computed as follows:

Net income determined by the Commis-

sioner, as set forth in Para. 19 hereof ..\$158,442.84

Less: Exemption 1,000.00

Income subject to normal tax\$157,442.84

Normal tax at 4% on \$4,000 ..\$ 160.00

Normal tax at 8% on \$153,-
442.84 12,275.43

Surtax on \$158,442.84 54,237.99

Total tax liability\$66,673.42

Amended Affidavit of Defense.

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting income for the calendar year 1920 of A. Overholt Company and the West Overton Distilling Company, and if said organizations were taxable trusts, as now contended by plaintiff, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting the aforesaid tax liabilities for 1920 of \$551,914.70 and \$66,673.42, and plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to him while receiving the benefit resulting from the inability of the United States to collect the said tax liabilities.

12. By reason of the facts aforesaid, plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income in property held in trust, and is further estopped to assert and claim that such income was not distributed or distributable to the plaintiff if such a trust existed, or that said income should be treated as the income of taxable trusts, and—or that plaintiff was not indebted to defendant in any amount on account of income taxes for the year 1920.

NEW MATTER.**THIRD DEFENSE.**

For a further and separate defense to plaintiff's statement of Claim, although fully relying upon and

Amended Affidavit of Defense.

reserving to himself the defenses hereinabove set forth, and without waiving the same, or any part thereof, the defendant alleges that the plaintiff ought not to recover of and from the defendant in this cause, in that:

1. At the time the additional tax for the year 1920 here in controversy was determined, assessed and paid, plaintiff was indebted to the United States in an amount equal to or in excess of the tax and interest so paid by plaintiff, even though the income on which the taxes in controversy was asserted be taxable under the provisions of law relating to trusts as income of taxable trusts.

2. If the income of A. Overholt & Company for the calendar year of 1920 had been treated by plaintiff and his brother, Richard B. Mellon, and/or the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been \$551,914.70, computed as hereinabove alleged.

3. If the income of West Overton Distilling Company for the calendar year 1920 had been treated by plaintiff and his brother, Richard B. Mellon, and/or by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been \$66,673.42, computed as hereinabove alleged.

4. Plaintiff and his brother, Richard B. Mellon, did not file returns as trustees of any such trust or

Amended Affidavit of Defense.

trusts, and have paid no Federal income tax as trustees of any such trust or trusts for the year 1920.

5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to the plaintiff, his brother, Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of \$551,914.70 could have been collected.

6. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of the aforesaid tax liability of \$551,914.70, plus interest as provided by law.

7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to the plaintiff, his brother, Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of \$66,673.42 could have been collected.

8. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of the aforesaid tax liability of \$66,673.42, plus interest as provided by law.

9. At the time the additional tax for the year 1920 here in controversy was determined, asserted and collected, plaintiff was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Company and West Overton Distilling

Amended Affidavit of Defense.

Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of \$202,502.22 collected by the defendant from the plaintiff as alleged in plaintiff's statement of claim.

10. By reason of the facts aforesaid, the above amount of \$202,502.22 collected by the defendant from the plaintiff as alleged in plaintiff's Statement of Claim, was justly owing to the United States by the plaintiff, even though the income for the year 1920 from the property of A. Overholt & Company and West Overton Distilling Company should have been treated under the provisions of law relating to trusts as income of taxable trusts.

WHEREFORE, defendant having fully answered, demands that he have judgment in his favor for his costs in this behalf expended, and for such other and further relief as may be just and proper.

D. B. HEINER,

D. B. HEINER,

*Former Collector of Internal
Revenue for the Twenty-third
District of Pennsylvania,
Defendant.*

HORATIO S. DUMBAULD,

HORATIO S. DUMBAULD,

United States Attorney.

D. LLOYD CLAYCOMB,

D. LLOYD CLAYCOMB,

Assistant United States Attorney,

Attorneys for the Defendant.

*Notice of Application to File Amended Affidavit of
Defense.*

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said County and Commonwealth, personally appeared D. B. HEINER, who, being duly sworn according to law, deposes and says that he has read the foregoing amended affidavit of defense and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

D. B. HEINER.

Subscribed and sworn to before me this 18th day
of October, 1934.

FRANK J. ATKINS,

(SEAL)

Notary Public.

My Commission expires March 2, 1937.

**Notice of Application to File Amended Affidavit
of Defense.**

No. 6979 Law.

TO: JENNIE KING MELLON, RICHARD KING MELLON,
SARAH MELLON SCAIFE and THE UNION TRUST
COMPANY OF PITTSBURGH,
Executors of the Estate of R. B. Mellon,
Deceased,

and/or their attorneys:

SMITH, SHAW, McCLAY AND SEIFERT,
747 Union Trust Building,
Pittsburgh, Pennsylvania:

You, and each of you, will please take notice that
at the opening of court on Monday, October 22, 1934,

*Application for Leave to File Amended Affidavit of
Defense.*

or as soon thereafter as the matter can be heard, the defendant, by his attorneys, will move the court for permission to file the attached Amended Affidavit of Defense in this cause and for an order that it be considered as the Affidavit of Defense herein.

HORATIO S. DUMBAULD,
*United States Attorney for the
Western District of Pennsylvania.*

D. LLOYD CLAYCOMB,
*Assistant United States Attorney,
Attorneys for the Defendant.*

**Application for Leave to File Amended Affidavit
of Defense.**

No. 6979 Law.

Comes now D. B. Heiner, defendant above named, by his attorneys, and respectfully moves the Court for permission to file in this cause the attached Amended Affidavit of Defense.

Respectfully submitted,

HORATIO S. DUMPAULD,
*United States Attorney for the
Western District of Pennsylvania.*

D. LLOYD CLAYCOMB,
*Assistant United States Attorney,
Attorneys for the Defendant.*

Amended Affidavit of Defense.

ORDER.

This matter coming on to be heard this 22nd day of October, 1934, it is ordered that the attached Amended Affidavit of Defense be filed in this cause and be considered as the Affidavit of Defense herein.

PER CURIAM,

G.

Amended Affidavit of Defense.

No. 6979 Law.

(Filed Oct. 22, 1934.)

Comes now D. B. Heiner, defendant above named, and alleges that he has just, true and legal defenses to the allegations contained in the Statement of Claim. The nature of the defenses is as follows:

FIRST DEFENSE.

1. Defendant admits that at the time of filing the Statement of Claim the then plaintiff, R. B. Mellon, resided in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof, but alleges that the said R. B. Mellon died testate on or about December 1, 1933, and that the duly qualified executors and executrices of his estate are Jennie King Mellon, Richard King Mellon and Sarah Mellon Scaife, all residents of Pittsburgh, Pennsylvania, and the Union Trust Company of Pittsburgh, a corporation doing business in Pittsburgh, Pennsylvania.

Amended Affidavit of Defense.

2. The allegations of Paragraph "2" of the Statement of Claim are admitted.

3. The allegations contained in Paragraph "3" of the Statement of Claim are admitted.

4. The allegations contained in Paragraph "4" of the Statement of Claim are admitted, except that the payment therein alleged to have been made on June 15, 1921, was in fact made on June 17, 1921; the payment therein alleged to have been made on September 15, 1921, was in fact made on September 19, 1921; and the payment therein alleged to have been made on December 15, 1921, was in fact made on December 17, 1921.

5. The allegations contained in Paragraph "5" of the Statement of Claim are admitted.

6. The allegations contained in Paragraph "6" of the Statement of Claim are admitted.

7. The allegations contained in Paragraph "7" of the Statement of Claim are admitted.

8. In answer to the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that for the reasons stated in the Statement of Claim, or for any other reasons, the said R. B. Mellon was not subject to or liable for any additional tax for the year 1920. On the contrary, defendant alleges that the additional taxes and interest described in Paragraph "7" of the Statement of Claim were just, due and owing to the United States, and correctly assessed and collected.

Amended Affidavit of Defense.

Further answering the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that the said R. B. Mellon had in fact overpaid his tax by the amount of \$38,952.14 for said year, and, on the contrary, alleges that no overpayment whatsoever, was made by him of his tax for the said year 1920.

9. The allegations contained in Paragraph "9" of the Statement of Claim are admitted.

10. In answer to the allegations contained in Paragraph "10" of the Statement of Claim, defendant admits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between said R. B. Mellon and Andrew W. Mellon, or between said parties and the personal representatives of Henry C. Frick.

Further answering the allegations contained in Paragraph "10" of the Statement of Claim, defendant avers and alleges that the two partnerships of "A. Overholt & Company" and "West Overton Distilling Company" were not terminated by the death of Henry C. Frick, but continued in existence until the winding up of their affairs was completed subsequent to the year 1920. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "10" of the Statement of Claim are denied.

11. In answer to the allegations contained in Paragraph "11" of the Statement of Claim, defendant denies that said R. B. Mellon and Andrew W. Mellon

Amended Affidavit of Defense.

began the liquidation of the two partnerships immediately after December 2, 1919, and denies that during the period from December 2, 1919, until January 31, 1921, said R. B. Mellon and Andrew W. Mellon acted in respect of the assets and businesses of said partnerships as liquidating trustees. On the contrary, defendant alleges that throughout the year 1920, the businesses of the aforesaid two partnerships were actively carried on and continued in the ordinary and usual manner.

Further answering the allegations contained in Paragraph "1F" of the Statement of Claim, defendant admits the making of the two agreements, copies of which are attached to the Statement of Claim as Exhibits "C" and "D", respectively, but denies the materiality thereof to any issue involved in this suit.

12. In answer to the allegations contained in Paragraph "12" of the Statement of Claim, defendant denies the allegations contained therein, and alleges that the books and records in respect to the business and activities of said partnerships and each of them for the year 1920, which is the only year material to this suit, were kept by the accrual method of accounting.

13. In answer to the allegations contained in Paragraph "13" of the Statement of Claim, defendant admits that in the year 1925 the property and assets then owned by said two partnerships were distributed to said R. B. Mellon and Andrew W. Mellon and the estate of Henry C. Frick. Except as herein above admitted,

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defendant denies the allegations in said paragraph contained.

14. In answer to the allegations contained in Paragraph "14" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including the year 1925 neither R. B. Mellon, his brother Andrew W. Mellon, nor the Union Trust Company of Pittsburgh engaged in the business of distilling spiritous liquors, and admits that all sales of spiritous liquors made by or on behalf of the said partnerships of A. Overholt & Company and West Overton Distilling Company during said period were made in compliance with the existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "14" of the Statement of Claim are denied.

15. Defendant denies the allegations contained in Paragraph "15" of the Statement of Claim and alleges that during the period from December 2, 1919, to and including December 31, 1920, there were no debts and/or contingent liabilities of substantial amount outstanding against the partnerships of A. Overholt & Company and West Overton Distilling Company, or either of them. Defendant further alleges that distributions of assets of said partnerships could have been made during said period.

16. In answer to the allegations contained in Paragraph "16" of the Statement of Claim, defendant admits that during the period from December 2,

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1919, to and including December 31, 1920, the assets of the partnerships of A. Overholt & Company and West Overton Distilling Company, including cash, were kept separately and were not comingled with the assets or cash of R. B. Mellon and/or Andrew W. Mellon. Except as herein before admitted, the allegations contained in Paragraph "16" of the Statement of Claim are denied.

17. In answer to the allegations contained in Paragraph "17" of the Statement of Claim, defendant alleges that said allegations are irrelevant and immaterial to any issue of law or fact involved in this proceeding and constitute an attempt to inject into the proceeding impertinent matters; therefore, defendant neither admits nor denies the same. Defendant further alleges that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal income tax liability of the estate of Henry C. Frick for the years 1920 and 1925 or for any year neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or upon his behalf.

18. In answer to the allegations contained in Paragraph "18" of the Statement of Claim, defendant admits that in his return for the year 1920, R. B. Mellon included the sum of \$48,350.74 as income from the partnership of A. Overholt & Company, and included the sum of \$5,960.55 as income from the partnership of West Overton Distilling Company. Defendant denies that any part of the said sums should

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not have been included as taxable income in R. B. Mellon's return for the year 1920, and on the contrary alleges that the entire income of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920 was taxable to R. B. Mellon and to the parties interested in said partnerships, as provided in Section 218 of the Revenue Act of 1918. Defendant denies that said sums, or either of them, were "so-called liquidating profits", and on the contrary alleges that said sums were part of the operating income earned by said partnerships in the ordinary course of business. Defendant denies that no part of said sums was received by R. B. Mellon until the year 1925, and denies that no part thereof was available to or subject to R. B. Mellon's demand, and on the contrary alleges that said sums were either received by him during the year 1920, or were in all respects his property available to him and subject to his disposition during said year. Defendant denies that no part of the profits from the liquidation of said partnerships was received by R. B. Mellon until the year 1925, and denies that no part thereof was available to or subject to his demand, and on the contrary alleges that a substantial part of said profits was either received by him prior to said year or was in all respects his property and available to him and subject to his disposition prior to said year. Defendant denies that said partnerships were in process of liquidation in the year 1920, and on the contrary alleges that the businesses of said partnerships were carried on in the ordinary and usual manner throughout said year of 1920. Defendant

denies that the income from said partnerships was not taxable until the liquidating payments to R. B. Mellon exceeded the cost value of his interest in the partnerships assets as of December 2, 1919, and on the contrary alleges that said partnerships were required to file partnership returns for the year 1920 in accordance with the provisions of Section 224 of the Revenue Act of 1918, and under the provisions of Section 218 of the said Revenue Act of 1918 plaintiff's distributive share of the net income of each of said partnerships for the year 1920 represented taxable income to him for said year. Defendant denies that payments received by R. B. Mellon from said partnerships prior to the year 1925 did not exceed the cost to him or the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary alleges that the payments received by R. B. Mellon prior to the year 1925 from each of the aforesaid partnerships exceeded the cost to him of his interest in the partnership assets.

19. In answer to the allegations contained in Paragraph "19" of the Statement of Claim, the defendant admits that the Commissioner increased R. B. Mellon's share of the net income of A. Overholt & Company for the year 1920 from \$48,350.74 to \$281,779.95, and increased R. B. Mellon's share of the net income of West Overton Distilling Company for the year 1920 from \$5,960.55 as reported on the return to \$52,814.28. Further answering, defendant alleges that the aforesaid amounts of \$281,779.95 and \$52,814.28, respectively, were R. B. Mellon's distributive shares of the net

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income earned by each of said partnerships during the year 1920 in the ordinary course of business and were computed by the Commissioner on the basis of the partnership returns and the books and records of said partnerships for the year 1920, as shown below:

A. Overholt & Company

Gross Income

Whiskey sales, not less than	\$ 928,273.71
Less: January 1, 1920 whiskey inventory	\$794,235.38
December 31, 1920 whiskey inventory ...	697,307.34
	96,928.04
Gross profit on whiskey sales	\$ 831,345.67
Sales of empty barrels, not less than	6,609.31
Charges for bottling and casing, not less than	320,533.61
Storage charges, not less than	42,550.50
Other operating income not allocated	33,578.67
Interest received	3,480.73
Rents received	300.00
Total	\$1,238,398.49

Deductions

Salaries and wages	\$ 39,600.01
Insurance	18,190.00
Taxes	31,132.86
Storage expense	23,446.60

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Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office .	3,519.59	
Cases, bottles, corks, other supplies and misc.	166,749.49	
Loss on Liberty Bonds	5,328.75	
Total		393,058.63
Net income		\$ 845,339.86
R. B. Mellon's one-third dis- tributive share		\$ 281,779.95

*West Overton Distilling Company**Gross Income*

Sales less returns		\$ 218,050.31
Less: Inventory December		
31, 1919	\$121,135.00	
Inventory December		
31, 1920	93,819.44	27,315.56
		\$ 190,734.75

Deductions

Labor	\$ 8,188.92
Taxes	2,236.44
Depreciation	1,739.49
Loss on Liberty Bonds	507.50
Storage	1,211.40
Insurance	5,528.16

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Other expenses—Bad debts, etc.	11,650.00
Salesmen's commissions	1,230.00
	<hr/>
Total	32,291.91
	<hr/>
Net income	\$ 158,442.84
R. B. Mellon's one-third dis- tributive share	\$ 52,814.28

20. In answer to the allegations contained in Paragraph "20" of the Statement of Claim, defendant alleges that said allegations are immaterial and irrelevant to any issue of law or fact involved in this proceeding, and, therefore, defendant neither admits nor denies the same. Defendant further alleges that any action taken by R. B. Mellon on or in connection with his income tax returns for the years 1921 to 1925, inclusive, cannot operate to preclude correct action as to the issues herein involved. Defendant further alleges that R. B. Mellon was taxable on his distributive share of the income of said partnerships, whether distributed or not.

21. In answer to the allegations contained in Paragraph "21" of the Statement of Claim, defendant alleges that it is entirely immaterial and irrelevant to any issue of fact or law involved in this action whether the Commissioner of Internal Revenue did or did not eliminate any profit or loss reported by R. B. Mellon on his income tax return for the year 1924. Any action taken by the Commissioner in respect of said re-

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turn neither operates to preclude correct action as to the issues herein involved nor as admissions against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "21" of the Statement of Claim, the defendant alleges that the Commissioner's final audit of R. B. Mellon's income tax return for the year 1924 showed an overassessment for said year in the amount of \$14,778.35, and alleges that in determining said overassessment, the Commissioner did not eliminate from R. B. Mellon's income tax return an amount of \$8,202.08 reported thereon as R. B. Mellon's distributive share of the income of "A. Overholt & Company, a partnership," and did not eliminate therefrom an amount of \$7,644.40 deducted on said return as R. B. Mellon's proportionate share of an operating loss sustained by the "West Overton Distilling Company, a partnership" during the said year.

22. In answer to the allegations contained in Paragraph "22" of the Statement of Claim, defendant alleges that any action which the Commissioner of Internal Revenue may have taken in determining the profit realized by R. B. Mellon in the year 1925 on the liquidation of the partnerships of A. Overholt & Company and West Overton Distilling Company is immaterial and irrelevant to any issue involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Further answering the allegations contained in Para-

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graph "22" of the Statement of Claim, defendant denies that the amount actually received by R. B. Mellon in the year 1925 in liquidation of his investment in said partnerships included the profits and losses of the partnerships for all or any prior years.

23. In answer to the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that it is entirely immaterial to any issue of fact or law involved in this proceeding what course the Commissioner of Internal Revenue may have taken in regard to the determination of a deficiency in income tax for the year 1925 against R. B. Mellon and as to the assessment or collection thereof. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf.

Further answering the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that on or about May 13, 1932, within the time provided by law, Richard B. Mellon, filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania at Pittsburgh, Pennsylvania, a claim for refund of income tax for the year 1925, claiming a refund of the full amount of the sum of \$41,008.-84 assessed and collected as a deficiency for said year, and alleges that said claim for refund is based in part on the alleged inclusion in income for the year 1925 of the operating net income of the aforesaid partnerships for the year 1920, and that said claim for refund for 1925 is pending undisposed of by the Commissioner of Internal Revenue.

24. In answer to the allegations of fact or law, if any, contained in Paragraph "24" of the Statement of Claim, the defendant denies the same. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue other than for the year 1920 is immaterial and irrelevant to any issue of fact or law involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by the defendant or on his behalf. Defendant further alleges that by reason of the pendency of the claim for refund for the year 1925, final action has not been taken by the Commissioner of Internal Revenue in regard to said year. Defendant further alleges that the Commissioner of Internal Revenue by his action in assessing and collecting the taxes involved in this action and by his rejection of the claim for refund for the year 1920, as hereinafter alleged, has duly determined that during the year 1920 the partnerships of A. Overholt & Company and West Overton Distilling Company realized and received income taxable, whether distributed or not, to R. B. Mellon and the other parties interested therein. Defendant further alleges that in letters dated April 16, 1932, February 27, 1934, and April 6, 1934, to Richard B. Mellon or to the estate of Richard B. Mellon, the Commissioner held that Richard B. Mellon's distributive share of the net income for the year 1920 of the partnerships of A. Overholt & Company and West Overton Distilling Company was "properly reportable in his 1920 return."

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25. In answer to the allegations contained in Paragraph "25" of the Statement of Claim, defendant admits that on or about March 19, 1929, R. B. Mellon filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose, a claim for refund of \$187,787.17, to-wit, the aforesaid sums of \$175,259.70 additional tax and \$12,527.47 interest for the year 1920. Defendant denies the remaining allegations in said Paragraph "25", and alleges that in said refund claim R. B. Mellon assigned the following reasons for the allowance thereof.

In my tax return for 1920 there was included in my income the amounts of \$48,350.74 and \$5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to \$281,779.95 and \$52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Ac-

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cordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of \$281,779.95 and \$52,814.28, erroneously included by the Commissioner in income for that year.

26. In answer to the allegations contained in Paragraph "26" of the Statement of Claim, defendant admits that the allegations therein contained were true at the time of the filing of the praecipe for summons in the instant cause on March 23, 1932. Defendant alleges, however, that by letter dated April 16, 1932, the Commissioner of Internal Revenue advised R. B. Mellon that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of the above mentioned partnerships was reportable in the year in which the income was realized. Said letter dated April 16, 1932, further advised R. B. Mellon that he would be afforded a hearing in the Income Tax Unit at Washington upon written request therefor. Said R. B. Mellon through counsel was afforded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter, by letter dated February 27, 1934, R. B. Mellon was advised of the Commissioner's determination with respect to his aforesaid claim for refund for the year 1920 as follows:

The claim for refund of \$187,787.17, income taxes for the year 1920 filed by Mr. R. B. Mellon, has been examined.

The claim is based on the statement that amounts of \$281,779.95 and \$52,814.28 were includ-

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ed in taxable income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.

Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at a conference held in Washington, D. C., October 12, 1932 and this office holds that Mr. Mellon's proportionate share of the operating profits of the above-mentioned partnerships was properly reportable in his 1920 return.

Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932, official notice of the disallowance of the claim will be issued by registered mail.

R. B. Mellon's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was sent by registered mail under date of April 6, 1934.

27. In answer to the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that the said additional tax of \$175,259.70, and the interest thereon of \$12,527.47, was not due and owing to the Government of the United States, and, on the contrary, alleges that said tax and said interest were due and owing and were justly collected. Further answering the allegations contained in Para-

graph "27" of the Statement of Claim, defendant denies that R. B. Mellon overstated his taxable income in his return, and denies that he overpaid his tax on the basis of said return. On the contrary, defendant alleges that said income was understated on the return, and that all payments made on said tax were due and owing to the United States, and were justly and correctly paid. Further answering the allegations contained in Paragraph "27," defendant denies that the income from the said two partnerships, during the year 1920, was not taxable in that year, and, on the contrary, alleges that it was subject to income tax and that the taxes heretofore assessed and collected thereon and in controversy in this action, were in all respects justly and correctly assessed and collected. Further answering the allegations contained in Paragraph "27," defendant denies that the said income was erroneously reported on the return, erroneously increased, and/or erroneously included as taxable income by the Commissioner. On the contrary, defendant alleges that the said income was reported in part on the return, the correct increases were made by the Commissioner of Internal Revenue, and both the original amount reported and the amount of increase were justly and correctly included as taxable income by the Commissioner.

28. In answer to the allegations contained in Paragraph "28" of the Statement of Claim, defendant admits that the Commissioner of Internal Revenue has included in R. B. Mellon's income for the year 1920 the sums of \$281,779.95 and \$52,814.28. Defendant

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denies, however, that said sums were liquidating profits of A. Overholt & Company and West Overton Distilling Company, but, on the contrary, alleges that said sums represent R. B. Mellon's one-third distributive share of the operating income and profits of the aforesaid partnerships of A. Overholt & Company and West Overton Distilling Company, respectively, for the year 1920. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue with respect to R. B. Mellon's income tax liability for the year 1925 is wholly immaterial and irrelevant to any issue involved in this proceeding, and any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Defendant further alleges that the Commissioner of Internal Revenue has not taken final action with respect to R. B. Mellon's income tax liability for the year 1925. Defendant admits that the Commissioner of Internal Revenue assessed and defendant collected the tax for the year 1920 based upon a net income which included the aforesaid sums of \$281,779.95 and \$52,814.28. Defendant alleges, however, that the Commissioner of Internal Revenue has not taken final action with respect to R. B. Mellon's income tax liability for the year 1925, and that if tax has been collected on the same income for each of the years 1920 and 1925, proper adjustment can be made by action on R. B. Mellon's refund claim for the year 1925.

29. In answer to the allegations contained in Paragraph "29" of the Statement of Claim, defend-

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ant denies that the computation set forth in Exhibit "E" attached to the Statement of Claim is a correct computation of R. B. Mellon's income tax liability for the year 1920, and denies that R. B. Mellon overpaid his income tax for said year. On the contrary, defendant alleges that R. B. Mellon's income tax liability for the year 1920 was correctly determined by the Commissioner of Internal Revenue, and that said taxes and the interest thereon were duly and legally assessed by the Commissioner of Internal Revenue and collected by the defendant.

30. In answer to the allegations contained in Paragraph "30" of the Statement of Claim, defendant denies that he was or is indebted to R. B. Mellon and/or any or all of the plaintiffs in the sum of \$187,787.17, with interest thereon from May 19, 1927, as provided by law, or in any sum whatsoever. Defendant owes plaintiff nothing.

NEW MATTER**SECOND DEFENSE**

For a further and second defense to the allegations contained in the Statement of Claim, the defendant, although fully relying on the defenses hereinabove set forth, alleges that the plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust, and are further estopped to assert and claim that such income was not distributed or distributable to R. B. Mellon

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if such a trust or trusts existed, and as such not taxable to R. B. Mellon, in that:

1. On or about March 15, 1921, Richard B. Mellon, executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and represented that A. Overholt & Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to Richard B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick.

2. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust.

3. In examining the partnership return filed in the name of and for A. Overholt & Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of A. Overholt & Company, and merely changed the amount of the income so reported.

4. R. B. Mellon first asserted and claimed that said income should be treated as the income of a tax-

able trust long after the filing of R. B. Mellon's claim for refund for the year 1920, and more than six years after March 15, 1921.

5. On or about March 15, 1921, Richard B. Mellon, executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and represented that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to Richard B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick.

6. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns for fiduciaries of a trust.

7. In examining the partnership return filed in the name of and for West Overton Distilling Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of West Overton Distilling Company, and merely changed the amount of the income so reported.

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8. R. B. Mellon first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of R. B. Mellon's claim for refund for the year 1920, and more than six years after March 15, 1921.

9. If the income of A. Overholt & Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his brother, Andrew W. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been \$551,914.70, computed as follows:

Net income as determined by the Commissioner, as set forth in Para. 19 hereof	\$845,339.86
Less: Exemption	1,000.00
	<hr/>
Income subject to normal tax..	\$844,339.86
Normal tax at 4% on \$4,000...\$	160.00
Normal tax at 8% on \$840,339.-	
86	67,227.19
Surtax on \$845,339.86	484,527.51
	<hr/>
Total tax liability	\$551,914.70

10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his brother, Andrew W. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been \$66,673.42, computed as follows:

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Net income determined by the Commissioner, as set forth in Para. 19 hereof	\$158,442.84
Less: Exemption	1,000.00
	<hr/>
Income subject to normal tax, .	\$157,442.84
Normal tax at 4% on \$4,000\$	160.00
Normal tax at 8% on \$153,442.84	12,275.43
Surtax on \$158,442.84	54,237.99
	<hr/>
Total tax liability	\$66,673.42

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and if said organizations were taxable trusts, as now contended by plaintiffs, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting the aforesaid tax liabilities for 1920 of \$551,914.70 and \$66,673.42, and plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the United States to collect the said tax liabilities.

12. By reason of the facts aforesaid, plaintiffs are estopped to assert and claim that any portion of

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the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust, and are further estopped to assert and claim that such income was not distributed or distributable to R. B. Mellon if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiffs are not indebted to defendant in any amount on account of income taxes of R. B. Mellon for the year 1920.

NEW MATTER

THIRD DEFENSE.

For a further and separate defense to the allegations contained in the Statement of Claim, although fully relying upon and reserving to himself the defenses hereinbefore set forth, and without waiving the same, or any part thereof, the defendant alleges that the plaintiffs ought not to recover of and from the defendant in this cause, in that:

1. At the time the additional tax for the year 1920 here in controversy was determined, assessed and paid, R. B. Mellon was indebted to the United States in an amount equal to or in excess of the tax and interest so paid by him, even though the income on which the taxes in controversy was asserted be taxable under the provisions of law relating to trusts as income of taxable trusts.

2. If the income of A. Overholt & Company for the calendar year of 1920 had been treated by R. B. Mellon and his brother, Andrew W. Mellon, and/or

the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been \$551,914.70, computed as hereinabove alleged.

3. If the income of West Overton Distilling Company for the calendar year 1920 had been treated by R. B. Mellon and his brother, Andrew W. Mellon, and/or by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been \$66,673.42, computed as hereinabove alleged.

4. R. B. Mellon and his brother, Andrew W. Mellon, did not file returns as trustees of any such trust or trusts, and have paid no Federal income tax as trustees of any such trust or trusts for the year 1920.

5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to R. B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of \$551,914.70 could have been collected.

6. The amount of money, together with the value of property so received by R. B. Mellon in distribution, was equal to or in excess of the aforesaid tax liability of \$551,914.70, plus interest as provided by law.

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7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of \$66,673.42 could have been collected.

8. The amount of money, together with the value of property so received by R. B. Mellon in distribution, was equal to or in excess of the aforesaid tax liability of \$66,673.42, plus interest as provided by law.

9. At the time the additional tax for the year 1920 here in controversy was determined, asserted and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Company and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of \$187,787.17 collected by the defendant from R. B. Mellon as alleged in the Statement of Claim.

10. By reason of the facts aforesaid, the above amount of \$187,787.17 collected by the defendant from R. B. Mellon as alleged in the Statement of Claim, was justly owing to the United States by R. B. Mellon, even though the income for the year 1920 from the property of A. Overholt & Company and West Overton Distilling Company should have been treated under the provisions of law relating to trusts as income of taxable trusts.

Amended Affidavit of Defense.

WHEREFORE, defendant having fully answered, demands that he have judgment in his favor for his costs in this behalf expended, and for such other and further relief as may be just and proper.

D. B. HEINER, .

D. B. HEINER,

*Former Collector of Internal Revenue
For the Twenty-Third District of Pennsylvania,
Defendant.*

HORATIO S. DUMBAULD,

HORATIO S. DUMBAULD,

United States Attorney.

D. LLOYD CLAYCOMB,

D. LLOYD CLAYCOMB,

*Assistant United States Attorney,
Attorneys for the Defendant.*

*Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:*

Before me, the undersigned authority, a Notary Public in and for said County and Commonwealth, personally appeared D. B. HEINER, who, being duly sworn according to law, deposes and says that he has read the foregoing amended affidavit of defense and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

D. B. HEINER.

Reply.

Subscribed and sworn to before me this 18th day of October, 1934.

FRANK J. ATKINS,
Notary Public.

(SEAL)

My commission expires March 2, 1937.

Reply.

No. 6980 Law.

(Filed Oct. 26, 1934.)

AND Now comes the plaintiff, A. W. Mellon, by his attorneys, W. A. Seifert and D. D. Shepard, and for reply to the new matter set forth in the amended affidavit of defense filed in the above-entitled case on October 20, 1934, admits, denies, avers and alleges as follows:

NEW MATTER

SECOND DEFENSE.

Plaintiff denies that he is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust and that he is further estopped to assert and claim that such income was not distributed or distributable to him if such a trust or trusts existed, and as such not taxable to him.

1. Plaintiff admits that on or about March 15, 1921, plaintiff and his brother, Richard B. Mellon,

caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for A. Overholt & Company, formerly a partnership, in liquidation, on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiff avers that said return constituted a return of income. Plaintiff denies that on said return of income it was claimed and represented that A. Overholt & Company was a partnership, and on the contrary plaintiff avers that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that, in fact and as a matter of law, the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiff avers that the use of a partnership form for the filing of a return of income does not bar nor preclude him from asserting that the tax should have been assessed on the correct and proper basis.

2. Plaintiff admits that neither he nor his brother, Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of A. Overholt & Company, on form 1040, a form prescribed for the making of returns by fiduciaries of a trust.

3. Plaintiff denies that in examining the return of income filed in the name of and for A. Overholt & Company and the income tax return filed by the plain-

Reply.

tiff for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Company and that he merely changed the amount of the income so reported. On the contrary, plaintiff avers that the manner and method of reporting the 1920 income of A. Overholt & Company on said return of income and on plaintiff's said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiff avers was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiff avers that in March, 1929, the Commissioner treated both the said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of A. Overholt & Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

4. Plaintiff denies that he first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary avers that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of A. Overholt & Company were taxable to the plaintiff as income in the year 1925 and not in the year 1920 and although plaintiff filed the claim for refund of the tax for the year 1920 just three

days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiff further avers that he and his brother made a full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

5. Plaintiff admits that on or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for West Overton Distilling Company, formerly a partnership, in liquidation, on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiff avers that said return constituted a return of income. Plaintiff denies that on said return of income it was claimed and represented that West Overton Distilling Company was a partnership, and on the contrary plaintiff avers that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiff avers that the use of a partnership form for the filing of a return of income does not bar nor preclude

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him from asserting that the tax should have been assessed on the correct and proper basis.

6. Plaintiff admits that neither he nor his brother, Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of West Overton Distilling Company, on form 1040, a form prescribed for the making of returns for fiduciaries of a trust.

7. Plaintiff denies that in examining the return of income filed in the name of and for West Overton Distilling Company and the income tax return filed by the plaintiff for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of West Overton Distilling Company and that he merely changed the amount of the income so reported. On the contrary, plaintiff avers that the manner and method of reporting the 1920 income of West Overton Distilling Company on said return of income and on plaintiff's said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiff avers was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiff avers that in March, 1929, the Commissioner treated both said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of West Overton Distilling Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

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8. Plaintiff denies that he first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary avers that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of West Overton Distilling Company were taxable to the plaintiff as income in the year 1925 and not in the year 1920 and although plaintiff filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiff further avers that he and his brother made a full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

9. Plaintiff admits that the correct tax liability for the year 1920 on \$845,339.86 of trust income would have been \$551,914.70, but denies that, if a taxable trust existed, the income subject to tax was \$845,339.86, and on the contrary avers that said trust, if it existed, realized no taxable income until distribution in 1925.

10. Plaintiff admits that the correct tax liability for the year 1920 on \$158,442.84 of trust income would

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have been \$66,673.42, but denies that, if a taxable trust existed, the income subject to tax was \$158,442.84, and on the contrary avers that said trust, if it existed, realized no taxable income until distribution in 1925.

11. Plaintiff denies that the defendant, the Commissioner and the United States relied to their prejudice on plaintiff's original position and representation in respect to the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and on the contrary avers that the defendant, the Commissioner and the United States did in March, 1929, determine that plaintiff did not realize taxable income in the year 1920 from the operation and sale of capital assets of A. Overholt & Company and West Overton Distilling Company, but that such alleged income was realized and taxable in the year 1925 upon final liquidation and distribution. Plaintiff admits that the Commissioner and the United States are now precluded from assessing and collecting the aforesaid alleged tax liabilities for 1920 of \$551,914.70 and \$66,673.42. Plaintiff denies that he is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to him; denies that he received any benefit resulting from the inability of the United States to collect the said tax liabilities, and on the contrary avers that the defendant, the Commissioner and the United States, with full knowledge of all the facts fully disclosed by plaintiff, determined in 1929 that the so-called liquidating profits alleged to have been realized in 1920 were

taxable income in 1925 upon final liquidation and distribution, rather than in 1920. Plaintiff further avers that in 1929 he accepted, acted and relied upon the determination of the defendant, the Commissioner and the United States that such alleged profits were taxable income in 1925, and paid the tax thereon as hereinafter averred.

12. For the reasons hereinbefore averred, plaintiff denies that he is estopped to assert and claim that any portion of the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust or that such income was not distributed or distributable to the plaintiff if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiff is not indebted to defendant in any amount on account of income taxes for the year 1920. Plaintiff further avers that the Commissioner acted with full knowledge of the facts in that he had immediate access to all of his books and records and to the books and records of A. Overholt & Company and West Overton Distilling Company in every year from 1918 to 1925, inclusive, and actually examined them; that the returns for each of said former partnerships for the year 1920 showed that said former partnerships were then in liquidation; that the Commissioner was not misled by the returns filed by A. Overholt & Company and West Overton Distilling Company; that there was no misstatement or concealment of facts by them, and there can be no foundation for estoppel because of a mistake of law.

Reply.

NEW MATTER

THIRD DEFENSE.

1. Plaintiff denies all the averments of paragraph 1, and on the contrary avers that defendant is indebted to plaintiff in the sum of \$202,502.22 with interest thereon from the first day of April, 1927.

2. Plaintiff denies all the averments of paragraph 2, and on the contrary avers that, if the liquidating trustees of the former partnership of A. Overholt & Company for the calendar year 1920 had been treated by either plaintiff and his brother, Richard B. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to the tax on the income realized from bottling, storage and similar operations.

3. Plaintiff denies all the averments of paragraph 3, and on the contrary avers that, if the liquidating trustees of the former partnership of West Overton Distilling Company for the calendar year 1920 had been treated by either plaintiff and his brother, Richard B. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

4. Plaintiff denies all the averments of paragraph 4, and on the contrary avers that he and his brother, as liquidating trustees of the former partnerships of A. Overholt & Company and West Overton Distilling Company, filed returns of income for the year 1920 which set forth sufficient facts to put the Commissioner on notice that, as a matter of law, they were in fact trustees of the said former partnerships and taxable as such.

5. Plaintiff admits that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Company were distributed to plaintiff, his brother, Richard B. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiff denies that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of \$551,914.70, and on the contrary avers that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by plaintiff of a substantial sum of money.

6. Plaintiff admits that the amount of money, together with the value of other property, received by him in distribution was equal to or in excess of the sum of \$551,914.70 plus interest as provided by law, but denies for the reasons hereinbefore stated that such sum constituted a tax liability.

7. Plaintiff admits that on or prior to December 31, 1925, all of the moneys, properties and assets of

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whatever nature of West Overton Distilling Company were distributed to plaintiff, his brother, Richard B. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiff denies that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of \$1,673.42, and on the contrary avers that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by plaintiff of a substantial sum of money.

8. Plaintiff admits that the amount of money, together with the value of other property, received by him in distribution was equal to or in excess of the sum of \$66,673.42 plus interest as provided by law, but denies for the reasons hereinbefore stated that such sum constituted a tax liability.

9. Plaintiff denies all the averments of paragraph 9, and on the contrary avers that the collection by the defendant of the amount of tax of \$202,502.22 was in all respects illegal, erroneous and void.

10. Plaintiff denies all the averments of paragraph 10, and on the contrary avers that the collection by the defendant from the plaintiff of the amount of \$202,502.22 was in all respects erroneous, illegal and void.

11. Plaintiff avers that on March 15, 1921, he and his brother, R. B. Mellon, made and caused to be filed returns of income for A. Overholt & Company and West Overton Distilling Company as surviving part-

ners and liquidating trustees of A. Overholt & Company and West Overton Distilling Company; that no assessment of any tax for the year 1920 has been made by the Commissioner against them, or either of them, as such surviving partners and liquidating trustees of the said two former partnerships or against the plaintiff as transferee of the assets of such former partnerships or liquidating trusteeships; and that the assessment and collection of any such tax are barred by lapse of time under and pursuant to the applicable statutes of the United States and the tax, if it ever existed, is now extinguished.

12. On or about March 15, 1926, The Union Trust Company of Pittsburgh, liquidating agent of A. Overholt & Company and West Overton Distilling Company for the years subsequent to 1920, made and caused to be filed fiduciary returns of income for the calendar year 1925. On or about the same day, plaintiff filed his income tax return for the year 1925 in which he reported his share of the income of A. Overholt & Company and West Overton Distilling Company as shown on the said returns filed by the liquidating agent. Thereafter and in March, 1929, the Commissioner increased the income for 1925 of both A. Overholt & Company and West Overton Distilling Company by adding to the reported income the net amount of income for the calendar years 1920 to 1924, inclusive, including therein the alleged income of the surviving partners or liquidating trustees of the said two former partnerships for the year 1920. The Commis-

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sioner thereupon assessed an additional tax for the year 1925 against plaintiff, and pursuant to notice and demand from defendant, with threats to distrain if the tax should not be paid within ten days, on or about June 13, 1929, plaintiff paid to the defendant said additional tax and interest amounting together to \$58,335.34. Plaintiff avers that he has heretofore paid a tax on account of the alleged income of said liquidating trustees for the year 1920, which tax was assessed on income included by the Commissioner for the year 1925 as aforesaid, and that therefore he is not now liable as transferee of said liquidating trusts for any alleged tax liability of such trusts for the year 1920.

WHEREFORE, plaintiff having fully replied, demands judgment in his favor for the amount set out in the statement of claim and for his costs in this behalf expended.

W. A. SEIFERT,
D. D. SHEPARD,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said county and commonwealth, personally appeared A. W. MELLON, who, being duly sworn according to law, deposes and says that the averments of fact set forth in the foregoing Reply are true and correct as he verily believes.

A. W. MELLON.

Reply.

Sworn to and subscribed before me this 26th day of October, 1934.

My commission expires June 27, 1936.

(SEAL)

P. J. HYLAND,
Notary Public.

Reply.

No. 6979 Law.

(Filed Oct. 26, 1934.)

AND Now come the plaintiffs, Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, Deceased, by their attorneys, Wm. M. Robinson, W. A. Seifert and D. D. Shepard, and for reply to the new matter set forth in the amended affidavit of defense filed in the above-entitled case on October 20, 1934, admit, deny, aver and allege as follows:

NEW MATTER**SECOND DEFENSE.**

Plaintiffs deny that they are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust and that they are further estopped to assert and claim that such income was not distributed or distributable to them if such a trust or trusts existed, and as such not taxable to them.

Reply.

1. Plaintiffs admit that on or about March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for A. Overholt & Company, formerly a partnership, in liquidation, on Form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiffs aver that said return constituted a return of income. Plaintiffs deny that on said return of income it was claimed and represented that A. Overholt & Company was a partnership, and on the contrary plaintiffs aver that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiffs aver that the use of a partnership form for the filing of a return of income does not bar nor preclude them from asserting that the tax should have been assessed on the correct and proper basis.

2. Plaintiffs admit that neither R. B. Mellon nor his brother, A. W. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of A. Overholt & Company, on form 1040, a form prescribed for the making of returns by fiduciaries of a trust.

3. Plaintiffs deny that in examining the return of income filed in the name of and for A. Overholt &

Company and the income tax return filed by R. B. Mellon for 1920, the Commissioners accepted the manner and method of reporting the 1920 income of A. Overholt & Company and that he merely changed the amount of the income so reported. On the contrary, plaintiffs aver that the manner and method of reporting the 1920 income of A. Overholt & Company on said return of income and on plaintiffs' said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiffs aver was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiffs aver that in March, 1929, the Commissioner treated both the profits from bottling, storage and similar items and the proceeds from the sale of whiskey of A. Overholt & Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

4. Plaintiffs deny that they first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary aver that they asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then, only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of A. Overholt & Company were taxable to the plaintiffs as income in the year 1925 and not in

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the year 1920 and although R. B. Mellon filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiffs further aver that R. B. Mellon and his brother made full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

5. Plaintiffs admit that on or about March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for West Overton Distilling Company, formerly a partnership, in liquidation on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiffs aver that said return constituted a return of income. Plaintiffs deny that on said return of income it was claimed and represented that West Overton Distilling Company was a partnership, and on the contrary plaintiffs aver that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law, the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plain-

tiffs aver that the use of a partnership form for the filing of a return of income does not bar nor preclude them from asserting that the tax should have been assessed on the correct and proper basis.

6. Plaintiffs admit that neither R. B. Mellon nor his brother, A. W. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of West Overton Distilling Company, on form 1040, a form prescribed for the making of returns for fiduciaries of a trust.

7. Plaintiffs deny that in examining the return of income filed in the name of and for West Overton Distilling Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of West Overton Distilling Company and that he merely changed the amount of the income so reported. On the contrary, plaintiffs aver that the manner and method of reporting the 1920 income of West Overton Distilling Company on said return of income and on R. B. Mellon's said income tax return was to report only profits from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiffs aver was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiffs aver that in March, 1929, the Commissioner treated said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of West Overton Distilling Com-

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pany for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

8. Plaintiffs deny that R. B. Mellon first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary aver that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of West Overton Distilling Company were taxable to R. B. Mellon as income in the year 1925 and not in the year 1920 and although R. B. Mellon filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiffs further aver that R. B. Mellon and his brother made full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

9. Plaintiffs admit that the correct tax liability for the year 1920 on \$845,339.86 of trust income would have been \$551,914.70, but deny that, if a taxable trust existed, the income subject to tax was \$845,339.86, and on the contrary aver that said trust, if it existed, realized no taxable income until distribution in 1925.

10. Plaintiffs admit that the correct tax liability for the year 1920 on \$158,442.84 of trust income would have been \$66,673.42, but deny that, if a taxable trust existed, the income subject to tax was \$158,442.84, and on the contrary aver that said trust, if it existed, realized no taxable income until distribution in 1925.

11. Plaintiffs deny that the defendant, the Commissioner and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and on the contrary aver that the defendant, the Commissioner and the United States did in March, 1929, determine that R. B. Mellon did not realize taxable income in the year 1920 from the operation and sale of capital assets of A. Overholt & Company and West Overton Distilling Company, but that such alleged income was realized and taxable in the year 1925 upon final liquidation and distribution. Plaintiffs admit that the Commissioner and the United States are now precluded from assessing and collecting the aforesaid alleged tax liabilities for 1920 of \$551,914.70 and \$66,673.42. Plaintiffs deny that they are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to R. B. Mellon; deny that R. B. Mellon received any benefit resulting from the inability of the United States to collect the said tax liabilities, and on the contrary aver that the defendant, the Com-

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missioner and the United States, with full knowledge of all the facts fully disclosed by R. B. Mellon, determined in 1929 that the so-called liquidating profits alleged to have been realized in 1920 were taxable income in 1925 upon final liquidation and distribution, rather than in 1920. Plaintiffs further aver that in 1929 R. B. Mellon accepted, acted and relied upon the determination of the defendant, the Commissioner and the United States, that such alleged profits were taxable income in 1925 and paid the tax thereon as hereinafter averred.

12. For the reasons hereinbefore averred, plaintiffs deny that they are estopped to assert and claim that any portion of the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust or that such income was not distributed or distributable to R. B. Mellon if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiffs are not indebted to defendant in any amount on account of income taxes for the year 1920. Plaintiffs further aver that the Commissioner acted with full knowledge of the facts in that he had immediate access to all of R. B. Mellon's books and records and to the books and records of A. Overholt & Company and West Overton Distilling Company in every year from 1918 to 1925, inclusive, and actually examined them; that the returns for each of said former partnerships for the year 1920 showed that said former partnerships were then in liquidation; that the Commissioner was not misled by the re-

turns filed by A. Overholt & Company and West Overton Distilling Company; that there was no misstatement or concealment of facts by them and there can be no foundation for estoppel because of a mistake of law.

NEW MATTER.

THIRD DEFENSE.

1. Plaintiffs deny all the averments of paragraph 1, and on the contrary aver that defendant is indebted to plaintiffs in the sum of \$187,787.17 with interest thereon from the nineteenth day of May, 1927.

2. Plaintiffs deny all the averments of paragraph 2, and on the contrary aver that, if the liquidating trustees of the former partnership of A. Overholt & Company for the calendar year 1920 had been treated by either R. B. Mellon and his brother, A. W. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

3. Plaintiffs deny all the averments of paragraph 3, and on the contrary aver that, if the liquidating trustees of the former partnership of West Overton Distilling Company for the calendar year 1920 had been treated by either R. B. Mellon and his brother, A. W. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, how-

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ever, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

4. Plaintiffs deny all the averments of paragraph 4, and on the contrary aver that R. B. Mellon and his brother, A. W. Mellon, as liquidating trustees of the former partnerships of A. Overholt & Company and West Overton Distilling Company filed returns of income for the year 1920 which set forth sufficient facts to put the Commissioner on notice that, as a matter of law, they were in fact trustees of the said former partnerships and taxable as such.

5. Plaintiffs admit that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Company were distributed to R. B. Mellon, his brother, A. W. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiffs deny that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of \$551,914.70, and on the contrary aver that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by R. B. Mellon of a substantial sum of money.

6. Plaintiffs admit that the amount of money, together with the value of other property, received by R. B. Mellon in distribution was equal to or in excess of the sum of \$551,914.70 plus interest as provided by law, but deny for the reasons hereinbefore stated that such sum constituted a tax liability.

7. Plaintiffs admit that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, his brother, A. W. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiffs deny that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of \$66,673.42, and on the contrary aver that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by R. B. Mellon of a substantial sum of money.

8. Plaintiffs admit that the amount of money, together with the value of other property, received by R. B. Mellon in distribution was equal to or in excess of the sum of \$66,673.42 plus interest as provided by law, but deny for the reasons hereinbefore stated that such sum constituted a tax liability.

9. Plaintiffs deny all the averments of paragraph 9, and on the contrary aver that the collection by the defendant of the amount of tax of \$187,787.17 was in all respects illegal, erroneous and void.

10. Plaintiffs deny all the averments of paragraph 10, and on the contrary aver that the collection by the defendant from R. B. Mellon of the amount of \$187,787.17 was in all respects erroneous, illegal and void.

11. Plaintiffs aver that on March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, made and caused to be filed returns of income for A. Overholt &

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Company and West Overton Distilling Company as surviving partners and liquidating trustees of A. Overholt & Company and West Overton Distilling Company; that no assessment of any tax for the year 1920 has been made by the Commissioner against them, or either of them, as such surviving partners and liquidating trustees of the said two former partnerships or against R. B. Mellon as transferee of the assets of such former partnerships or liquidating trusteeships; and that the assessment and collection of any such tax are barred by lapse of time under and pursuant to the applicable statutes of the United States and the tax, if it ever existed, is now extinguished.

12. On or about March 15, 1926, The Union Trust Company of Pittsburgh, liquidating agent of A. Overholt & Company and West Overton Distilling Company for the years subsequent to 1920, made and caused to be filed fiduciary returns of income for the calendar year 1925. On or about the same day, R. B. Mellon filed his income tax return for the year 1925 in which he reported his share of the income of A. Overholt & Company and West Overton Distilling Company as shown on the said returns filed by the liquidating agent. Thereafter and in March, 1929, the Commissioner increased the income for 1925 of both A. Overholt & Company and West Overton Distilling Company by adding to the reported income the net amount of income for the calendar years 1920 to 1924, inclusive, including therein the alleged income of the surviving partners or liquidating trustees of the said two former partnerships for the year 1920. The Commissioner

thereupon assessed an additional tax for the year 1925 against R. B. Mellon, and pursuant to notice and demand from defendant, with threats to distrain if the tax should not be paid within ten days, on or about May 10, 1927, plaintiffs paid to the defendant said additional tax and interest amounting together to \$175,259.70. Plaintiffs aver that R. B. Mellon has heretofore paid a tax on account of the alleged income of said liquidating trustees for the year 1920, which tax was assessed on income included by the Commissioner for the year 1925 as aforesaid, and that, therefore, the plaintiffs are not now liable as transferee of said liquidating trusts for any alleged tax liability of such trusts for the year 1920.

WHEREFORE, plaintiffs having fully replied, demand judgment in their favor for the amount set out in the statement of claim and for their costs in this behalf expended.

WM. W. ROBINSON,
W. A. SEIFERT,
D. D. SHEPARD,
Attorneys for Plaintiffs.

Commonwealth of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said county and commonwealth, personally appeared RICHARD KING MELLON, who, being duly sworn according to law, deposes and says

Stipulation Waiving Jury Trial.

that the averments of fact set forth in the foregoing Reply are true and correct as he verily believes.

RICHARD KING MELLON,
One of the Executors.

Sworn and Subscribed to before me this 26th day of October, 1934.

P. J. HYLAND,
Notary Public.

My Commission Expires June 27, 1936.

Stipulation Waiving Jury Trial.

No. 6980 Law.

(Filed Oct. 29, 1934.)

Now, To-WIT, this 27th day of September, 1934,
IT IS HEREBY STIPULATED AND AGREED by and between the above parties, by their attorneys of record, that the cause may be tried and determined by the Court without the intervention of a jury, each party reserving the right of appeal as in such cases made and provided.

SMITH, SHAW, McCLAY & SEIFERT,
Attorneys for Plaintiff.

HORATIO S. DUMBAULD,
*United States Attorney for the
Western District of Pennsylvania.*

JOHN A. McCANN,
*Special Assistant to the U. S. Attorney,
Attorneys for Defendant.*

*Stipulation Waiving Jury Trial.
Opinion.*

Stipulation Waiving Jury Trial.

No. 6979 Law.

(Filed Oct. 29, 1934.)

Now, To-WIT, this 27th day of September, 1934,
IT IS HEREBY STIPULATED AND AGREED by and between
the above parties, by their attorneys of record, that
the cause may be tried and determined by the Court
without the intervention of a jury, each party reserv-
ing the right of appeal as in such cases made and pro-
vided.

SMITH, SHAW, McCLAY & SEIFERT,
Attorneys for Plaintiffs.

HORATIO S. DUMBAULD,
*United States Attorney for the
Western District of Pennsylvania.*

JOHN A. McCANN,
*Special Assistant to the United States Attorney,
Attorneys for Defendant.*

Opinion.

No. 6980 Law.

(Filed Feb. 17, 1936.)

GIBSON, *District Judge.*

The Court makes the following:

FINDINGS OF FACT

1. A. W. Mellon, hereinafter called the plaintiff,
resided in the City of Pittsburgh, Allegheny County,

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Pennsylvania, and in the Western District thereof, when suit was filed.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit: March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of \$919,777.86 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	\$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of overpayment of 1917 tax)	9,650.69
December 15, 1921	229,944.48

Total\$919,777.86

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner"), notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$190,419.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$190,419.70 for the year 1920, as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$190,419.70 together with interest thereon of \$12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$190,419.70 and \$12,082.52.

8. On or about December 12, 1918, plaintiff, his brother, R. B. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious

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Names Act. True and correct copies of said partnership agreements are attached to the statement of claim ship agreements are attached to the statement of claim, made part thereof and marked Exhibits "A" and "B", respectively.

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

15. Plaintiff and R. B. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased

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partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$190,419.70 tax and \$12,082.52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

22. The Commissioner took no action upon plaintiff's claim for refund for more than six months before suit was brought, but has denied said claim subsequent to suit.

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Over-

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ton Distilling Company on 1920, and prior thereto during the existence of the partnerships was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

24. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

CONCLUSIONS OF LAW

I No taxable gain is realized during the liquidation of a partnership dissolved by the death of a former partner, until the proceeds realized exceed the cost basis to the former partners of their partnership interests.

II The assets of a partnership which ordinarily might be considered stock in trade of a going business become capital assets when the partnership is dissolved by the death of a partner and the partnership interests are in process of liquidation.

III On the sale of such capital assets by such partnership in liquidation, profits may not be computed and taxed prior to final liquidation.

IV Plaintiff is entitled to recover for the full amount of his claim, together with interest according to law.

DISCUSSION

Prior to December of 1918, A. Overholt & Company and West Overton Distilling Company, corporations, operated distilleries in this District. On December 12, 1918, R. B. Mellon, A. W. Mellon and H. C. Frick formed two partnerships, under the same names as the corporations, for the purpose of taking over and liquidating the distilleries. The partners acted together for this purpose from January 1, 1919, to December 2, 1919, when Mr. Frick died. Thereafter A. W. and R. B. Mellon continued the liquidation of the properties.

The partnership agreements each provided: "In case of dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable." On January 31, 1921, the surviving partners appointed The Union Trust Company of Pittsburgh as liquidating agent, and that company continued the liquidation in the same manner as the partners except that no whisky was thereafter sold prior to final sale of the properties. The liquidating agent finished its task in 1925.

In March, 1921, A. W. Mellon and R. B. Mellon each filed his income tax return for 1920, and R. B. Mellon filed tax returns for A. Overholt & Company

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and West Overton Distilling Company upon the form prescribed for partnership returns by the Commissioner of Internal Revenue. The partnership returns showed, in the case of each company, a gain arising from the sale of barrels, bottling, etc., and R. B. Mellon and A. W. Mellon each included one-third of such gain as part of his 1920 income. The gain through sales of whisky was not reported as income of the respective partnerships, but a memorandum showing such computed gains was attached to each return. Neither R. B. Mellon nor A. W. Mellon returned his share of such gains as a part of his income. The exclusion of these gains was based upon the theory that the taxpayers were engaged in the conversion of capital assets, and any gain therefrom was not distributive in 1920, and was not distributable, under the circumstances, until it had been made apparent that the proceeds of the liquidation exceeded the cost basis to the former partners of their partnership interests. It was held the profits could not be determined prior to completed liquidation. Also, as a reason for the exclusion, plaintiff was engaged in winding up the affairs of a dissolved partnership.

The Commissioner did not, at first, accede to the contention of the taxpayers, and held the gains upon the sale of whisky to be profits for the year 1920, and distributive in that year. He assessed against A. W. Mellon and R. B. Mellon an additional tax, in amount equal to the principal sum which each seeks to recover in the instant suit brought by him, which was paid under protest. Later the Commissioner held that no

profit was realized until final liquidation. This position was maintained in respect to the years 1921-1925 inclusive, and settlement was made with the Estate of H. C. Frick upon that basis. He reverted to his original holding in 1932, but did not actually disallow the claim of the plaintiff for a refund of the 1920 deficiency tax until after the instant suit was brought.

The profits from liquor sales of 1920 were a part of the profits of the final liquidation in 1925, upon which the plaintiff paid income tax for the latter year, and no return has been made, nor tender of return, of either the tax for 1920 or any portion of the tax for 1925. Hence it is apparent that the plaintiff has been compelled to pay a double tax upon his share of the gain upon whiskey sales in 1920. The gains or losses of 1921-2-3-4 were all included as of 1925 and charged to that year.

Passing for the moment any question as to the propriety of the form of returns made by the two partnerships, it is apparent that the first question before the court is whether the gain for 1920 should be charged to that year or to 1925, as a taxpayer cannot be compelled to pay two income taxes upon the same gain.

We are of opinion that the gain from the sale of whisky in 1920 was not taxable as income in that year. Several reasons for the opinion may be cited. First, the properties held by the two partnerships, dissolved by the death of Mr. Frick, were being liquidated, and the whisky sold was a capital asset until the proceeds of the sale exceeded the cost of the interests of the

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partners; that it is unquestioned that the cost to the partners was greater than the proceeds of sale of 1920. See Art. 1570, Regulation 45, promulgated under Revenue Act of 1918. And second, the plaintiff, as a surviving partner, was one of the trustees of the Frick interest with the duty of accounting upon termination of the liquidation; and this liquidation was not, and could not reasonably have been, completed in 1920. It will be remembered, in this connection, that each of the partnerships kept its books in the accrual basis of accounting. The accounting and distribution was not made until 1925, and until that year neither of the surviving partners included cash of the partnerships with his own funds. The defendant has questioned this statement, and points to the books of the partnerships which show that each partner and the Estate of Mr. Frick received large sums of money in the year 1920. These, however, were charged to "Bills Receivable," and appeared as loans. The books also show that these sums were returned, some of them in the year 1920. The book entries and the repayments make it plain, we think, that the sums so received were not paid out in distribution of the gains of the partnerships.

Attention has been called to an opinion of this court in *GUCKENHEIMER & BROS. CO. v. HEINER*, decided May 12, 1934, which, counsel for defendant claims, is counter to the claim of plaintiff in the instant suit. The conditions of that case are not those of the instant case. The Guckenheimer case was brought by the still existing corporation to recover taxes paid on its be-

half. The liquidation carried on was the liquidation of the interests of former stockholders rather than of the company, which continued in business. The liquidations of the partnerships in the instant action were actually completed, and in 1920 were under the necessity of completion by reason of the provisions of the Uniform Partnership Act of Pennsylvania.

The finding that the gains in 1920 were not distributed or distributive in that year is determinative of the fact that judgment must be entered in favor of the plaintiff. The plaintiff, however, in addition to the facts upon which the instant judgment is based, asserts that the deficiency assessment for the year 1920, was invalid for another reason. He alleges that the surviving members of the partnerships were acting in a fiduciary capacity, and as such constituted a taxable entity, and therefore, even if it were to be held that income had been earned in 1920, the assessment should have been made against the two surviving partners jointly, as trustees, and not against an individual partner, based upon his undistributed share. Against this claim the defendant, in addition to a denial of the general proposition, has contended that the plaintiff would be estopped from setting up such a defense after making returns as a partnership, and has also set up an equitable defense in the nature of recoupment, alleging that if plaintiff and his partners had filed a fiduciary return of the partnerships for 1920, the ultimate individual liability would have been greater than it was under the assessment made, and that plaintiff

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with R. B. Mellon and the Frick Estate, as transferees of all the property of the partnerships in 1925, may not now recover when it is apparent that the amount of the taxes assessed and paid by each of them was less than it would ultimately have been if it had been assessed against the surviving partners as fiduciaries.

As to this second claim of the plaintiff, the established facts do not sustain the defense of estoppel. The return was made upon a partnership form, but all the basic facts were shown by it to the Commissioner. The mistake, if such it was, in the return and assessment was a mutual mistake of law. As to the recoupment defense, it was met by the finding that the gain of the partnership in 1920 was not distributed nor distributive. But the second claim of the plaintiff, and the equitable defenses thereto, in the opinion of the court, raise only moot questions, as the return was properly made.

“On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.”

Sec. 30, Act of March 26, 1915 (P. L. 18).

“Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.”

Sec. 33, Act of 1915.

In addition to the quoted provisions of the Uniform Partnership Act of Pennsylvania, which provide

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for the continuance of the business of the partnership for the limited purpose stated therein, a continuance of the partnership after the death of a partner was contemplated by the partnership agreements, which gave surviving partners the right to appoint a liquidating agent. As stated, these questions are moot, in view of the finding that the gains of 1920 did not constitute income from the sale of a stock in trade, but were proceeds from the sale of capital assets which had not, in that year, equaled the amount of the cost bases to the former partners; and the further finding that such gains, in the hands of the surviving partners in trust for the Estate of H. C. Frick, as well as for themselves, were not distributive in 1920.

An order will be made for the entry of judgment for the plaintiff.

ORDER.

No. 6980 Law.

And now, to wit, February 17, 1936, it is hereby ordered that judgment be entered in favor of the plaintiff, A. W. Mellon, and against the defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, in the sum of Two hundred two thousand, five hundred two and 22/100 (\$202,502.22) Dollars, with interest from April 1, 1927, according to law.

Per Curiam,
G.

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Thereupon, on February 17, 1936, the Clerk of the Court, pursuant to the above order entered judgment in favor of the plaintiff and against the defendant, individually and as collector, in the sum of \$202,502.22, with interest from April 1, 1927, according to law, as shown by the docket entries hereinbefore set forth.

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No. 6979 Law.

(Filed Feb. 17, 1936.)

GIBSON, *District Judge.*

The court makes the following

FINDINGS OF FACT.

1. R. B. Mellon, hereinafter called the plaintiff, resided in the city of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof, when suit was filed.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and

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has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of \$406,673.28 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	\$101,668.32
June 15, 1921	101,668.32
September 15, 1921	101,668.32
December 15, 1921	101,668.32

Total\$406,673.28

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$175,259.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$175,259.70 for the

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year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$175,259.70 together with interest thereon of \$12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$175,259.70 and \$12,527.47.

8. On or about December 12, 1918, R. B. Mellon, his brother, A. W. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached to the statement of claim, made part thereof and marked Exhibits "A" and "B" respectively.

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the Statement of Claim, made part thereof and marked Exhibits "C" and "D", respectively.

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

13. During the period of liquidation, from December 2, 1919, to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

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14. On December 2, 1919, and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

15. Plaintiff and A. W. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive; and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

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21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$175,259.70 and \$12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

22. The Commissioner took no action upon plaintiff's claim for refund for more than six months before the suit was brought, but has denied said claim subsequent to suit.

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

24. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for the year 1925. He has assessed and collected a tax on the same income in each of said years.

CONCLUSIONS OF LAW

I No Taxable gain is realized during the liquidation of a partnership dissolved by the death of a for-

mer partner, until the proceeds realized exceed the cost bases to the former partners of their partnership interests.

II The assets of a partnership which ordinarily might be considered stock in trade of a going business become capital assets when the partnership is dissolved by the death of a partner and the partnership interests are in process of liquidation.

III On the sale of such capital assets by such partnership in liquidation, profits may not be computed and taxed prior to final liquidation.

IV Plaintiffs are entitled to recover for the full amount of their claims, together with interest according to law.

DISCUSSION

Prior to December of 1918, A. Overholt & Company and West Overton Distilling Company, corporations, operated distilleries in this District. On December 12, 1918, R. B. Mellon, A. W. Mellon and H. C. Frick formed two partnerships, under the same names as the corporations, for the purpose of taking over and liquidating the distilleries. The partners acted together for this purpose from January 1, 1919, to December 2, 1919, when Mr. Frick died. Thereafter A. W. and R. B. Mellon continued the liquidation of the properties.

The partnership agreements each provided: "In case of dissolution of the firm by death of one or more

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of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable." On January 31, 1921, the surviving partners appointed the Union Trust Company of Pittsburgh as liquidating agent, and that company continued the liquidation in the same manner as the partners except that no whiskey was thereafter sold prior to final sale of the properties. The liquidating agent finished its task in 1925.

In March, 1921, A. W. Mellon and R. B. Mellon each filed his income tax return for 1920, and R. B. Mellon filed tax returns for A. Overholt & Company and West Overton Distilling Company upon the form prescribed for partnership returns by the Commissioner of Internal Revenue. The partnership returns showed, in the case of each company, a gain arising from the sale of barrels, bottling, etc., and R. B. Mellon and A. W. Mellon each included one-third of such gain as part of his 1920 income. The gain through sales of whisky was not reported as income of the respective partnerships, but a memorandum showing such computed gains was attached to each return. Neither R. B. Mellon nor A. W. Mellon returned his share of such gains as a part of his income. The exclusion of these gains was based upon the theory that the taxpayers were engaged in the conversion of capital assets, and any gain therefrom was not distributive in 1920, and

was not distributable, under the circumstances, until it had been made apparent that the proceeds of the liquidation exceeded the cost basis to the former partners of their partnership interests. It was held the profits could not be determined prior to completed liquidation. Also, as a reason for the exclusion, plaintiffs were engaged in winding up the affairs of a dissolved partnership.

The Commissioner did not, at first, accede to the contention of the taxpayers, and held the gains upon the sale of whisky to be profits for the year 1920, and distributive in that year. He assessed against A. W. Mellon and R. B. Mellon an additional tax, in amount equal to the principal sum which each seeks to recover in the instant suit brought by him, which was paid under protest. Later the Commissioner held that no profit was realized until final liquidation. This position was maintained in respect to the years 1921-1925 inclusive, and settlement was made with the Estate of H. C. Frick upon this basis. He reverted to his original holding in 1932, but did not actually disallow the claims of the respective plaintiffs for a refund of the 1920 deficiency tax until after the instant suits were brought.

The profits from liquor sales of 1920 were a part of the profits of the final liquidation in 1925, upon which the respective plaintiffs paid income tax for the latter year, and no return has been made, nor tender of return, of either the tax for 1920 or any portion of the tax for 1925. Hence it is apparent that the plaintiff in each suit has been compelled to pay a double tax

Opinion.

upon his share of the gain upon whisky sales in 1920. The gains or losses of 1921-2-3-4 were all included as of 1925 and charged to that year.

Passing for the moment any question as to the propriety of the form of returns made by the two partnerships, it is apparent that the first question before the court is whether the gain for 1920 should be charged to that year or to 1925, as a taxpayer cannot be compelled to pay two income taxes upon the same gain.

We are of opinion that the gain from the sale of whisky in 1920 was not taxable as income in that year. Several reasons for the opinion may be cited. First, the properties held by the two partnerships, dissolved by the death of Mr. Frick, were being liquidated, and the whisky sold was a capital asset until the proceeds of the sale exceeded the cost of the interests of the partners; and it is unquestioned that the cost to the partners was greater than the proceeds of sale in 1920. See Art. 1570, Regulation 45 promulgated under Revenue Act of 1918. And second, the plaintiffs, as surviving partners, were trustees of the Frick interest with the duty of accounting upon termination of the liquidation; and this liquidation was not, and could not reasonably have been, completed in 1920. It will be remembered, in this connection, that each of the partnerships kept its books in the accrual basis of accounting. The accounting and distribution was not made until 1925, and until that year neither of the surviving partners included cash of the partnerships with his own funds. The defendant has questioned this state-

ment, and points to the books of the partnerships which show that each plaintiff and the Estate of Mr. Frick received large sums of money in the year 1920. These, however, were charged to "Bills Receivable," and appeared as loans. The books also show that these sums were returned, some of them in the year 1920. The book entries and the repayments make it plain, we think, that the sums so received were not paid out in distribution of the gains of the partnerships.

Attention has been called to an opinion of this court in *Guckenheimer & Bros. Co. v. Heimer*, decided May 12, 1934, which, counsel for defendant claims, is counter to the claims of plaintiffs in the instant suits. The conditions of that case are not those of the instant cases. The Guckenheimer case was brought by the still existing corporation to recover taxes paid on its behalf. The liquidation carried on was the liquidation of the interests of former stockholders rather than of the company, which continued in business. The liquidations of the partnerships in the instant actions were actually completed, and in 1920 were under the necessity of completion by reason of the provisions of the Uniform Partnership Act of Pennsylvania.

The finding that the gains in 1920 were not distributed or distributive in that year is determinative of the fact that judgment must be entered in favor of the plaintiffs. The plaintiff in each case, however, in addition to the facts upon which the instant judgment is based, asserts that the deficiency assessment for the year 1920, was invalid for another reason. He alleges

Opinion.

that the surviving members of the partnerships were acting in a fiduciary capacity, and as such constituted a taxable entity, and therefore, even if it were to be held that income had been earned in 1920, the assessment should have been made against the two surviving partners jointly, as trustees, and not against an individual partner, based upon his undistributed share. Against this claim the defendant, in addition to a denial of the general proposition, has contended that the plaintiffs would be estopped from setting up such a defense after making returns as a partnership, and has also set up an equitable defense in the nature of recoupment, alleging that if plaintiffs had filed a fiduciary return of the partnerships for 1920, the ultimate individual liability would have been greater than it was under the assessment made, and that plaintiffs with the Frick Estate, as transferees of all the property of the partnerships in 1925, may not now recover when it is apparent that the amount of the taxes assessed and paid by each of them was less than it would ultimately have been if it had been assessed against the surviving partners as fiduciaries.

As to this second claim of the plaintiffs, the established facts do not sustain the defense of estoppel. The return was made upon a partnership form, but all the basic facts were shown by it to the Commissioner. The mistake, if such it was, in the return and assessment was a mutual mistake of law. As to the recoupment defense, it was met by the finding that the gain of the partnership in 1920 was not distributed nor distributive. But the second claim of the plaintiffs, and

the equitable defenses thereto, in the opinion of the court, raise only moot questions, as the return was properly made.

"On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed."

Sec. 30, Act of March 26, 1915 (P. L. 18).

"Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership."

Sec. 33, Act of 1915.

In addition to the quoted provisions of the Uniform Partnership Act of Pennsylvania, which provide for the continuance of the business of the partnership for the limited purpose stated therein, a continuance of the partnership after the death of a partner was contemplated by the partnership agreements, which gave surviving partners the right to appoint a liquidating agent. As stated, these questions are moot, in view of the finding that the gains of 1920 did not constitute income from the sale of a stock in trade, but were proceeds from the sale of capital assets which had not, in that year, equaled the amount of the cost bases to the former partners; and the further finding that such gains, in the hands of the surviving partners in trust for the Estate of H. C. Frick, as well as for themselves, were not distributive in 1920.

An order will be made for the entry of judgment for the plaintiff in each case.

Motion.

ORDER.

No. 6979 Law.

And now, to-wit, February 17, 1936, it is hereby ordered that judgment be entered in favor of the plaintiffs, JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY OF PITTSBURGH, EXECUTORS of the ESTATE of R. B. MELLON, deceased, and against the defendant, D. B. HEINER, individually and as former Collector of Internal Revenue, in the sum of One hundred eighty-seven thousand, seven hundred eighty-seven and 17/100 (\$187,787.17) Dollars, with interest from May 19, 1927, according to law.

PER CURIAM,

G.

Thereupon, on February 17, 1936, the Clerk of the Court, pursuant to the above order entered judgment in favor of the plaintiffs and against the defendant, individually and as collector, in the sum of \$187,787.17, with interest from May 19, 1927, as shown by the docket entries hereinbefore set forth.

Motion.

No. 6980 Law.

(Filed Apr. 16, 1936.)

Comes now the defendant and presents that this term of Court adjourns on May 3, 1936, and that addi-

Motion.

tional time is needed within which to prepare and file a bill of exceptions herein.

Wherefore, defendant prays for an extension of time until July 1, 1936, within which to prepare, have allowed, and file said bill of exceptions.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

No objection.

W. A. SELFERT,
REED, SMITH, SHAW & McCLAY,
Attorneys for the Plaintiff.

ORDER.

Ordered, adjudged and decreed, that the time for the signing, allowance and filing of the bill of exceptions of defendant is hereby extended to July 1, 1936, and it is further ordered that the present term of this Court be and the same hereby is, extended for said purpose until the expiration of said extended time.

Dated, April 16, 1936.

R. M. GIBSON,
District Judge.

Motion.

Motion.

No. 6979 Law.

(Filed Apr. 16, 1936.)

Comes now the defendant and presents that this term of Court adjourns on May 3, 1936, and that additional time is needed within which to prepare and file a bill of exceptions herein.

Wherefore, defendant prays for an extension of time until July 1, 1936, within which to prepare, have allowed, and file said bill of exceptions.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

No objection.

W. A. SEIFERT,
REED, SMITH, SHAW & McCLAY,
Attorneys for the Plaintiff.

ORDER.

Ordered, adjudged and decreed, that the time for the signing, allowance and filing of the bill of exceptions of defendant is hereby extended to July 1, 1936, and it is further ordered that the present term of this

Stipulation.

Court be and the same hereby is, extended for said purpose until the expiration of said extended time.

Dated, April 16, 1936.

R. M. GIBSON,
District Judge.

Stipulation.

No. 6980 Law.

(Filed June 10, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time of the appellant to file a transcript of the record on appeal may be extended to and including the tenth day of July, 1936.

W. A. SEIFERT,
REED, SMITH, SHAW & McCLAY,
Attorneys for the Plaintiff.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

Stipulation.

ORDER.

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

Dated: This 10 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6979 Law.

(Filed June 10, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time of the appellant to file a transcript of the record on appeal may be extended to and including the tenth day of July, 1936.

W. A. SEIFERT,
REED, SMITH, SHAW & McCLAY,
Attorneys for the Plaintiff.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

Stipulation.

ORDER.

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

Dated: This 10th day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6980 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936, and that the time of the appellant to file a transcript of the record on appeal may be extended to August 10, 1936.

REED, SMITH, SHAW & McCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*
ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

Stipulation.

ORDER.

In accordance with the foregoing stipulation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended to August 1, 1936, and that the prior term of this court (heretofore extended by order to July 1, 1936) be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6979 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936, and that the time of the appellant to file a tran-

Stipulation.

script of the record on appeal may be extended to August 10, 1936.

REED, SMITH, SHAW & McCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

ORDER.

In accordance with the foregoing stipulation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended to August 1, 1936, and that the prior term of this court (heretofore extended by order to July 1, 1936) be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

Stipulation.

No. 6980 Law.

No. 6979 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by the attorneys for the respective parties that the two above-entitled actions may be consolidated for all purposes of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records on appeal in these cases may be consolidated, printed and filed as one record, and that the Court may enter an order accordingly.

REED, SMITH, SHAW & McCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

ORRIS BENNETT,
*Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.*

ORDER.

In accordance with the foregoing stipulation it is ordered that the above-entitled actions be consolidated for the purpose of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records

Petition for Appeal.

on appeal be consolidated, printed and filed as one record.

Dated June 20, 1936.

R. M. GIBSON,
D. J.

Petition for Appeal.

No. 6980 Law.

(Filed May 13, 1936.)

To the Honorable Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania:

And now, to-wit, this 13 day of May, A. D. 1936, comes D. B. Heiner, individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, the above named defendant, by his attorneys Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney in and for said District, feeling aggrieved by the judgment entered herein on February 17, 1936, in favor of the plaintiff and against the defendant, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be

Petition for Appeal.

sent to the Circuit Court of Appeals for the Third Circuit in accordance with law and the practice of this Court.

Defendant, your petitioner, further prays that citation of appeal issue and be served upon the plaintiff herein according to law and the practice of the Court, and that upon the service of said citation said appeal may operate as a supersedeas until final disposition of the cause, this being a case brought up by the Treasury Department, a department of the Government of the United States of America, and by direction of the Attorney General thereof.

Defendant, your petitioner, further prays that after due hearing, judgment be entered reversing the judgment of the said District Court.

Defendant, your petitioner, further prays for all orders necessary in the premises and for general relief, and your petitioner will ever pray, etc.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

D. LLOYD CLAYCOMB,
*Assistant United States Attorney,
Attorneys for the Defendant.*

ORDER.

It is ordered that the appeal as above prayed for be allowed, and that said appeal shall operate as a

Petition for Appeal.

supersedeas with respect to the judgment against the defendant.

Dated, Pittsburgh, Pennsylvania, May 13, 1936.

R. M. GIBSON,
United States District Judge.

Petition for Appeal.

No. 6979 Law.

(Filed May 13, 1936.)

*To the Honorable Robert M. Gibson, Judge of the
District Court of the United States for the Western
District of Pennsylvania:*

And now, to-wit, this 13th day of May, A. D. 1936, comes D. B. Heiner, individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, the above named defendant, by his attorneys Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney in and for said District, feeling aggrieved by the judgment entered herein on February 17, 1936, in favor of the plaintiffs and against the defendant, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated,

Petition for Appeal.

may be sent to the Circuit Court of Appeals for the Third Circuit in accordance with law and the practice of this Court.

Defendant, your petitioner, further prays that citation of appeal issue and be served upon the plaintiffs herein according to law and the practice of the Court, and that upon the service of said citation said appeal may operate as a supersedeas until final disposition of the cause, this being a case brought up by the Treasury Department, a department of the Government of the United States of America, and by direction of the Attorney General thereof.

Defendant, your petitioner, further prays that after due hearing, judgment be entered reversing the judgment of the said District Court.

Defendant, your petitioner, further prays for all orders necessary in the premises and for general relief, and your petitioner will ever pray, etc.

CHARLES F. UHL,
*United States Attorney for the
Western District of Pennsylvania,*

D. LLOYD CLAYCOMB,
*Assistant United States Attorney,
Attorneys for the Defendant.*

ORDER.

It is ordered that the appeal as above prayed for be allowed, and that said appeal shall operate as a

Assignment of Errors.

supersedeas with respect to the judgment against the defendant.

Dated, Pittsburgh, Pennsylvania, May 13, 1936.

R. M. GIBSON,
United States District Judge.

Assignment of Errors.

No. 6980 Law.

(Filed May 13, 1936.)

AND Now, to-wit: this 13th day of May, A. D. 1936, comes the defendant D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, by his attorney Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and, in connection with his appeal, says that in the record, proceedings, findings of fact, conclusions of law, and final judgment in said cause, manifest errors intervene to his prejudice and injury, and he assigns and relies upon the following errors to reverse the judgment entered herein:

1. The Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.

2. The Court erred in overruling defendant's motion for judgment upon conclusion of the plaintiff's case.

Assignment of Errors.

3. The Court erred in overruling defendant's motion for judgment made and filed at the close of all of the evidence and before submission of the case to the Court.

4. The Court erred in refusing to grant each and every part of the defendant's requests for special findings of fact and conclusions of law.

5. The Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

6. The Court erred in admitting in evidence, over objection and exception of the defendant, two written agreements dated January 31, 1921, whereby the Union Trust Company of Pittsburgh was appointed so-called liquidating agent with respect to the partnerships A. Overholt & Co. and West Overton Distilling Company, marked Exhibits C. and D attached to plaintiff's statement of claim, for the reason that said instruments are irrelevant and immaterial because they refer to actions of the parties subsequent to 1920; that 1920 is the only tax year involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in the case.

7. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 13 of plaintiff's statement of claim reading as follows:

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

Assignment of Errors.

for the reason that the same is irrelevant and immaterial and is not admitted by the amended affidavit of defense.

8. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 14 of plaintiff's statement of claim reading "During the period of liquidation", in the first line, and the words "liquidating trustees", for the reason that they tender conclusions of law and not statements of fact and are not admitted by the amended affidavit of defense. Said Paragraph 14, as admitted in evidence, reads as follows:

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

9. The Court erred in admitting in evidence, over objection and exception of the defendant the words in Paragraph 16 of plaintiff's statement of claim reading "while acting in the capacity of liquidating trustees" and the words "treating the same as trust properties", for the reason that the same are conclusions of law and are not admitted by the amended affidavit of defense. Said Paragraph 16 as admitted by the Court reads as follows:

Assignment of Errors.

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

10. The Court erred in admitting, over objection and exception of the defendant, Paragraph 17 of plaintiff's statement of claim, reading as follows:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis. for the reason that the same is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose, and not admitted by the amended affidavit of defense.

11. The Court erred in admitting, over defendant's objection and exception, the following portion of Paragraph 18 of plaintiff's statement of claim, with the inclusion of the word "undistributed", for the reason that the same is irrelevant and immaterial and is properly traversed by the amended affidavit of defense. Paragraph 18 as admitted by the Court, with the inclusion of said word, reads as follows:

Assignment of Errors.

18. In his return for said year 1920, plaintiff* * * included as taxable profit his undistributed share of the so-called* * * profits of A. Overholt & Company in the amount of \$48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of \$5,960.55 * * *.

12. The Court erred in admitting, over objection and exception of the defendant, Paragraph 20 of plaintiff's statement of claim, as follows:

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that the same is wholly immaterial and irrelevant to any of the issues in this case and is not admitted by the amended affidavit of defense.

13. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 21 of plaintiff's statement of claim, reading as follows:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

Assignment of Errors.

“ ‘Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.’ ”

“ ‘Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.’ ”

for the reason that the affirmative matter set up by defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of plaintiff's statement of claim, and for the further reason that in any event said allegations are wholly irrelevant and immaterial.

14. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 22 of plaintiff's statement of claim reading as follows:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive.

* * *

for the reason that the same is irrelevant and immaterial for the reasons specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that the same is not admitted by said amended affidavit of defense.

Assignment of Errors.

15. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 23 of plaintiff's statement of claim, reading as follows:

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of \$48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

“ ‘Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.’ ”

for the reason that said Paragraph 23 is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case,

Assignment of Errors.

and is redundant and is not admitted by the amended affidavit of defense and because the amended affidavit of defense specifically alleges that a claim for refund filed by plaintiff for 1925 was still pending, undisposed of, by the Commissioner of Internal Revenue and that said 1925 claim was based, in part, on the alleged inclusion of 1920 operating profits of the partnerships.

16. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 28 of plaintiff's statement of claim reading "and has also included said profits in plaintiff's income for 1925", and the last sentence of said Paragraph 28 reading "He has assessed and collected a tax on the same income in each of said years", for the reason that same are irrelevant and immaterial and because the amended affidavit of defense specifically alleges that no final action had yet been taken by the Commissioner with respect to plaintiff's income tax liability for 1925. Said Paragraph 28 as admitted in evidence, with the inclusion of said duly objected to parts, reads as follows:

28. The Commissioner of Internal Revenue has included * * * profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

17. The Court erred in overruling defendant's objection to the following question asked by plaintiff's

Assignment of Errors.

counsel of the witness Hicks, on the ground that the same called for a conclusion of the witness and was not the best evidence, and was leading and suggestive:

Q. Was that carried on all through the years from 1919 to 1925?

A. Yes.

18. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of the witness Hicks, and in overruling defendant's motion to strike the following answer there-to:

Q. Was there a profit made out of bottling?

A. There was a profit made on bottling.

for the reason that said question is leading and suggestive.

19. The Court erred in overruling defendant's motion to strike the following answer of the witness Hicks to the following question:

Q. After that what did you do?

A. Decided—the partnership decided not to sell anything unless they could sell the balance of the stock to some one person or concern.

for the reason that said question is not confined to the year 1920, which is the only year in issue in this case.

20. The Court erred in overruling defendant's objection to the following questions, and in allowing the same to be answered by the witness Hicks:

Q. In 1921—or until the final sale in 1925, had you any negotiations with anyone as to the sale of the entire plant?

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A. We had several inquiries. Mr. Rosensteel—I think that was in 1922, but he made us no real offer; and Mr. Pell—

Q. Mr. Pell of New York, a broker, finally made the sale?

A. Yes.

Q. And prior to the final sale had he introduced you to any other purchaser?

A. Yes, he had.

for the reason that the same are irrelevant and immaterial.

21. The Court erred in overruling the objection of the defendant to the following question, and in allowing the same to be answered by witness Hicks:

Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?

A. No, sir.

for the reason that said question calls for a conclusion of the witness, is incompetent, irrelevant and immaterial and not the best evidence.

22. The Court erred in overruling defendant's objection to the following question, and in allowing it to be answered:

Q. Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business which might result in the expenditure of a large amount of money by distillers?

A. Yes.

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for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues involved in the case, and for the further reason that the testimony or the proof offered is too general and does not establish or tend to establish the question of whether or not there were debts and contingent liabilities, or the amounts of them, and for the further reason that the offer of proof is not a tender of an issue of fact but a tender of an issue of law, and has no bearing whatsoever upon the right of the Government to levy and collect a tax for the year 1920.

23. The Court erred in refusing to sustain defendant's objection to the following questions and in overruling defendant's motion to strike the following answers thereto of the witness Hicks:

Q. Mr. Hicks, how much whiskey was there on hand in 1920?

A. It would be pretty hard to state just exactly the amount, but I would say around sixty thousand in the two distilleries.

Q. Barrels?

A. Yes.

for the reason that such testimony is not the best evidence and that the question is not confined to a specific time.

24. The Court erred in overruling defendant's motion to strike the answer of plaintiff's witness Seifert to the following question:

Q. Were you in 1920 attorney for Messrs.

A. W. and R. B. Mellon in conjunction with the A.

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Overholt & Company and West Overton Distilling Company?

A. Mr. James H. Beal, former partner of Reed, Smith, Shaw & Beal, and myself were counsel for liquidating trustees of A. Overholt & Company and the West Overton Distilling Company during the year 1920.

for the reason that the answer was not responsive to the question.

25. The Court erred in overruling defendant's objection to the following question, and in allowing the same to be answered by the witness Seifert:

Q. When there did you hear any rumors, definite or otherwise, in regard to certain proposed policies which the Government might adopt in regard to imposition of a floor tax on whiskey, in regard to the requiring the removal of all whiskey to concentration warehouses, and in regard to requiring all whiskey to be bottled immediately?

A. I did.

for the reason that said question is argumentative, is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness and is too general.

26. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered, and in overruling defendant's motion to strike said answer thereto:

Q. Did you as attorney for Messrs. A. W. and R. B. Mellon advise them or their associate in

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regard to the distribution of profits or of the profits from the sale of whiskey of the two former partnerships, A. Overholt & Company and West Overton Distilling Company?

A. As counsel with Mr. James H. Beal, we advised Mr. R. B. Mellon, who was the managing partner of A. Overholt & Company, partnership—managing partner of the surviving partners, A. W. Mellon and R. B. Mellon, of the West Overton Distilling Company and A. Overholt & Company, that no distribution could be made until certain questions had been settled—as definitely as we as counsel could advise them—about a possible floor tax, possible expense and tax involved in removing the whiskey to Government warehouses, should the Government require that; possible tax and expense involved in bottling the whiskey which was then in the distilleries at West Overton and A. Overholt & Company's plant at Bradford.

for the reason that the question is irrelevant and immaterial and not binding on the defendant and, with respect to the motion to strike, for the reason that the answer is not responsive but is argumentative and invades the province of the Court, and doeh not tend to prove or disprove any issue involved in this case.

27. The Court erred in overruling defendant's motion to strike the following question and answer thereto of the witness Seifert:

Q. Would these matters have involved any amount of money, if they had been adopted by the Government?

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A. They would have involved very large sums of money, sums of money larger than the company at that time would have been—or sums larger than the surviving partners at that time would have been able to have taken care of out of the then assets of the partnership.

for the reason that the question calls for a conclusion of the witness and the answer is a conclusion, and neither tends to prove or disprove any issue in the case.

28. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing it to be answered:

Q. Did the fact that a tax might be assessed on all whiskey, either as a floor tax or as an Internal Revenue tax upon bottling, enter into your consideration in giving your advice to Messrs. A. W. and R. B. Mellon?

A. It certainly did.

for the reason that the same is incompetent, irrelevant and immaterial.

29. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following questions:

Q. Do you personally know whether the Commissioner declared a deficiency in income tax against the two corporations for any of the years 1916, '17 or '18?

A. I know that the Commissioner—

Q. Just answer whether you know or not.

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A. If you mean by "asserting deficiency" proposing deficiency in letters which were addressed to the corporations, I will answer that question yes.

for the reason that the answer is not responsive.

30. The Court erred in overruling defendant's objection to the following questions asked of the witness Seifert, and in allowing the same to be answered:

Q. Approximately what do they amount to?

A. About \$550,000 for the years '16, '17 and '18.

for the reason that it is immaterial and irrelevant to the issues involved in this case what deficiencies may have been asserted or determined prior to the year 1920.

31. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered:

Q. When that distribution was made, did you or did you not advise them with respect to the unpaid income taxes and whether or not any part should be retained to meet those payments when they were demanded.

A. Yes, sir.

for the reason that the same is incompetent, irrelevant and immaterial, as well as leading.

32. The Court erred in overruling defendant's motion to strike the following question and answer with respect to the witness Seifert:

Q. What was your advise to the surviving partners in the year 1925?

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A. Our advice was that no distribution of any of the assets of the partnership could be made until all debts had been discharged and all possible contingent liabilities disposed of.

for the reason that the same is incompetent, irrelevant, immaterial and, in any event, the answer is not responsive to the question and cannot bind the defendant.

33. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following question:

Q. In the year 1925, I mean.

A. In the year 1925, as the assets had been disposed of in bulk, we advised that distribution could then be made of everything except what might be necessary to take care of undisposed of Federal income and excess profits tax liabilities. for the reason that the same is immaterial and incompetent.

34. The Court erred in overruling defendant's motion to strike the entire testimony of plaintiff's witness Seifert, for the reason that said testimony does not prove or tend to prove any issue involved in this case; the testimony is argumentative, an expression of conclusions by the witness, and is incompetent, irrelevant and immaterial.

35. The Court erred in refusing to admit in evidence, as an admission by plaintiff because of insufficient denial thereof, the following portion of Paragraph 11 of defendant's second defense to plaintiff's statement of claim and in sustaining plaintiff's objection thereto:

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11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company.

36. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of the following offer of proof by defendant's witness Updike, after being duly qualified:

The result of a computation of the tax of the plaintiff for the year 1925, in accordance with Bureau letter dated March 15, 1929, in evidence, eliminating yearly gains and losses for the period from December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income which would show that plaintiff underpaid his tax for the year 1925, admitting for said purpose everything contended for by plaintiff. It was offered to rebut plaintiff's allegation in Paragraph 28 of its statement of claim that there resulted, by reason of the assertion of a deficiency for 1925, double taxation on the same income, namely, for 1920 and 1925, defendant offered to show by this computation and proof that there has been no double taxation; that such computation was also offered in rebuttal of the latter allegation in the statement of claim. The Court was advised that said Paragraph 28 of the statement of claim was one of

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the paragraphs to which defendant made objection on the ground that it is irrelevant and immaterial and on which defendant says that if the Court decides adversely to defendant's contention in that respect, then defendant is left without any proof rebutting the inference of the allegation in the statement of claim. The Court was also advised that the proof would show that, taking the amount determined by the Commissioner as the amount for 1925, which plaintiff now contends included the incomes for 1920 and the incomes and losses for the intervening years, that defendant proposed to deduct those amounts in this computation and to show that the tax on the remainder amounts to more than the plaintiff claims he is entitled to have refunded for 1925.

37. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of defendant's offer to prove by the witness Updike that a computation of the tax of A. W. Mellon for 1925, in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that the plaintiff A. W. Mellon has underpaid his tax for the year 1925 in the amount of \$81,971.53.

38. The Court erred in allowing the witness Banks to answer, over defendant's objection, the following question interposed by plaintiff's counsel during re-direct examination:

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Q. Were there additional repayments in the year 1922?

A. In the year 1922 the ledger account shows \$90,000 repaid to the partnership by the individuals.

39. The Court erred in not ruling, prior to conclusion of the trial, on the admissibility of the testimony of the witness Banks, because all of his testimony was objected to by plaintiff and parts objected to by defendant and all of the Court's rulings were: "overruled for the present"; that it does not appear by any rulings whether the Court considered the witness's testimony as admitted and disbelieved by him or excluded consideration of said testimony in arriving at his findings, conclusions and judgment.

40. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 5, being a certified copy of decree of the Orphans' Court of Allegheny County, entered December 24, 1931, respecting final distribution of the Estate of Henry C. Frick, for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issues involved in this case. It is mere hearsay and is not binding on the defendant and not proper rebuttal.

41. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of its rebuttal witness Buchanan, and in allowing the same to be answered:

Q. In connection with income and estate tax on the Estate of Henry C. Frick, did you have up

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with the Bureau of Internal Revenue at Washington the question of the taxes growing out of the liquidation of A. Overholt & Company and the West Overton Distilling Company?

A. I did.

for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue involved in the case, and is not proper rebuttal testimony and for the further reason that the basis for computing the gain or loss in connection with arriving at the income tax due from an estate is on a different basis and under a different statute entirely from that involving individuals, and the basis of values is entirely different; and this offer of testimony has no relevancy or materiality to any of these issues. The Estate of Henry C. Frick is not a party to this proceeding, and is not involved, and any action that the Commissioner may have taken with reference to that taxpayer, if it should be erroneous, does not preclude the Commissioner from taking a correct action against some other taxpayer.

42. The Court erred in overruling defendant's objection to the following question asked by plaintiff of his rebuttal witness Buchanan, and in allowing the same to be answered:

Q. When was the settlement made with the Bureau of Internal Revenue in connection with Mr. Frick's income taxes on this liquidation?

A. In the year 1928.

for the same reasons as given in support of the immediately previous objection.

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43. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 6, being copy of a letter addressed to the witness Buchanan as counsel for the Estate of Henry C. Frick, covering the income tax liability of the Frick Estate from December 3, 1919 to the end of 1923, for the reason that the same is not the original and is incompetent, irrelevant and immaterial, and for the further reasons assigned in support of the two immediately preceding objections.

44. The Court erred in overruling defendant's objection to the following question and in allowing the same to be answered by plaintiff's witness Buchanan, and in overruling defendant's motion to strike the following answer thereto as not being responsive and being incompetent, irrelevant and immaterial:

Q. That is what I meant. And did you reach any understanding or agreement with respect to settlement on that basis?

A. Before or in the course of the hearings on the question of A. Overholt & Company income in Washington, in the case of the Estate of H. C. Frick, I conferred with Mr. Seifert as attorney for the other partners of that firm, and I was authorized by Mr. Seifert to say that the ruling made in the case of the Estate of H. C. Frick could be made also in the cases of the other two partners, which had not yet been reached in audit, as I understood. I so advised the conference in Washington.

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45. The Court erred in overruling defendant's objections to the following questions asked by plaintiff of the witness Buchanan, and in allowing the same to be answered:

Q: What was the ruling in 1925—as to 1925 income?

A. Shall I read into the record the ruling?

Q. Yes.

A. The ruling for 1925 is somewhat lengthy. It begins this way: "The following adjustments have been made in net capital gain as set up in Exhibit 'B' revised"—Perhaps I can show it to the attorney for the United States and have it copied into the record instead of reading all these figures.

for the same reasons as noted in support of the four immediately previous objections.

46. The Court erred in overruling defendant's objection to the following questions asked of the witness Buchanan, and in allowing the same to be answered:

Q. Well, can you give us the effect of that ruling?

A. The amount received by the estate in 1925—

Q. Just a moment. I mean the basis for the ruling; can you give that?

A. That is what I am trying to give. The amount received by the estate in liquidation in 1925 was shown, and the cost of the decedent's interest based on an amended balance sheet of

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December 2, 1919, and giving effect to adjustments made in the audit of the 1918 return, was shown; a comparison of those two figures showed a profit. A similar comparison in the case of the West Overton Distilling Company showed a profit; and these profits were shown in net capital gain. I would like to make this explanation, however: that this was not the final letter received by the Estate of H. C. Frick, which did not come until February of 1928. On account of other adjustments in tax liability, the taxpayer did not elect to take advantage of capital gain rates, because there would be no advantage in doing so, and therefore the ultimate tax was not at capital gain rates.

for the reason that the questions call for a conclusion of the witness.

47. The Court erred in overruling defendant's motion to strike all the testimony of plaintiff's rebuttal witness Buchanan for the reason that the same is incompetent, irrelevant, and immaterial, hearsay, and not binding on the defendant, and not proper rebuttal testimony, not tending to prove or disprove any issue involved in this case.

48. The Court erred in finding as a matter of fact that (Finding No. 5):

- 5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner"), notified plaintiff that his tax return for the year 1920 had been examined in

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connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$190,419.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is vague, indefinite, misleading and contrary to the undisputed evidence, in that, as shown by Defendant's Exhibit E, said letter of February 21, 1927 was a sixty-day deficiency letter advising plaintiff that there appeared to be a deficiency in tax for 1920 of \$190,419.70 and advising him of his right to appeal from said determination by the filing of his petition with the Board of Tax Appeals within sixty days, and that said tentative determination of deficiency resulted from the Commissioner including in plaintiff's individual income his distributive share in the net income of the partnerships A. Overholt & Company and West Overton Distilling Company, with the inclusion in the net income of said partnerships of profit on sales of whiskey by each of said partnerships, which profit plaintiff had omitted in his individual income tax return for 1920.

49. The Court erred in finding as a matter of fact that (Finding No. 6):

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Com-

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missioner had assessed the deficiency in tax of \$190,419.70 for the year 1920, as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$190,419.70 together with interest thereon of \$12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is contrary to the undisputed evidence, in that, as shown by defendant's Exhibit S, the plaintiff had, in writing, waived his right to file a petition with the Board of Tax Appeals for a redetermination of said deficiency in tax for 1920 and had consented, in writing, to the immediate assessment and collection of said tax; that plaintiff voluntarily made payment of said deficiency assessment without threats, as found by the Court.

50. The Court erred in finding as a matter of fact that (Finding No. 7):

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$190,419.70 and \$12,082.52. for the reason that there is no substantial evidence in the record to support said finding and that said finding is contrary to the undisputed evidence, in that, as shown by defendant's Exhibit S, plaintiff, in writing, consented to the assessment and immediate collection

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of said tax and interest and voluntarily paid the same to defendant upon receipt of notice that said tax and interest had been assessed.

51. The Court erred in finding as a matter of fact that (Finding No. 9):

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

for the reason that there is no substantial evidence in the record to support said finding.

52. The Court erred in finding as a matter of fact that (Finding No. 10):

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which

are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 11 of plaintiff's statement of claim, the latter portion of which paragraph was duly denied by defendant in his amended affidavit of defense.

53. The Court erred in finding as a matter of fact that (Finding No. 11):

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 12 of plaintiff's statement of claim which specifically denies said paragraph and alleges that said partnerships' books and records for the year 1920 were kept by the accrual method of accounting.

54. The Court erred in finding as a matter of fact that (Finding No. 12):

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and that said finding

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is identical in language with Paragraph 13 of plaintiff's statement of claim, which paragraph is not admitted by the defendants amended affidavit of defense.

55. The Court erred in finding as a matter of fact that (Finding No. 13):

13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 14 of plaintiff's statement of claim, which is duly traversed by Paragraph 14 of defendant's amended affidavit of defense.

56. The Court erred in finding as a matter of fact that (Finding No. 14):

14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial and contrary to the undisputed evidence, in that the testimony of defendant's witness Banks relative to the books of the A. Overholt & Company and defendant's Exhibit MMM, being copy of accounts receivable of the A. Overholt & Company, showed distributions in fact to have been made by the A. Overholt & Company to plaintiff, R. B. Mellon and the Frick Estate during 1920.

57. The Court erred in finding as a matter of fact that (Finding No. 15):

15. Plaintiff and R. B. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 16 of plaintiff's statement of claim, which is not admitted by defendant's amended affidavit of defense.

58. The Court erred in finding as a matter of fact that (Finding No. 16):

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt

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& Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial, as specifically set forth in Paragraph 17 of the defendant's amended affidavit of defense.

59. The Court erred in finding as a matter of fact that (Finding No. 17):

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 17 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 17 of defendant's amended affidavit of defense.

60. The Court erred in finding as a matter of fact that (Finding No. 18):

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said

years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is substantially identical in language with Paragraph 20 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 20 of defendant's amended affidavit of defense.

61. The Court erred in finding as a matter of fact that (Finding No. 19):

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language

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with Paragraph 21 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 21 of defendant's amended affidavit of defense.

62. The Court erred in finding as a matter of fact that (Finding No. 20):

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 22 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that said finding is contrary to the undisputed evidence, in that, after defendant with leave of Court amended his amended affidavit of defense so as to specifically deny the allegations of the second sentence of said Paragraph 22 in the statement of claim, being identical with the second sentence of the Court's finding No. 20, and it was shown by the testimony of the witness Banks and by defendant's Exhibit MMM that the amounts actually received in liquidation in 1925 did not include the amounts dis-

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tributed during 1920 and succeeding years immediately prior to final liquidation of said partnerships.

63. The Court erred in finding as a matter of fact that (Finding No. 21):

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$190,419.70 tax and \$12,082.52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 25 of plaintiff's statement of claim, is duly traversed by Paragraph 25 of defendant's amended affidavit of defense.

64. The Court erred in finding as a matter of fact that (Finding No. 23):

23. The sum received from the sale of Whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding is wholly immaterial.

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65. The Court erred in finding as a matter of fact that (Finding No. 24):

24. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years. for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding, which is identical in language with Paragraph 28 of plaintiff's statement of claim, is wholly immaterial for the reasons specifically set forth in Paragraph 28 of defendant's amended affidavit of defense.

66. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 1):

The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim herein was filed on October 24, 1933, by plaintiff, A. W. Mellon, a resident of the City of Pittsburgh, Allegheny County, Pennsylvania.

67. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 3):

During the year 1920, plaintiff kept his books and records and filed his income tax return for

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said year on the cash receipts and disbursements method of accounting. On or about the fifteenth day of March, 1921, plaintiff filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was \$919,777.86, which amount was duly assessed and paid.

68. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 4):

On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania. True and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon, and Henry C. Frick had equal one-third interests in each of said partnerships.

69. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 5):

On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partner-

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ship of A. Overholt & Co. At or about the same time the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spirituous liquors stored in bonded warehouses.

70. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 6):

The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spirituous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of accounting.

71. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 7):

Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was \$845,339.86, computed in the following manner:

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GROSS INCOME	
Whiskey sales, not less than	\$ 928,273.71
Less: January 1, 1920 whiskey inventory \$794,235.38	
December 31, 1920 whiskey inventory	697,307.34
	96,928.04
Gross profit on whiskey sales	831,345.67
Sales of empty barrels, not less than ...	6,609.31
Charges for bottling and casing, not less than	320,533.61
Storage charges, not less than	42,550.50
Other operating income not allocated ..	33,578.67
Interest received	3,480.73
Rents received	300.00
Total	\$1,238,398.49
DEDUCTIONS	
Salaries and wages	39,600.01
Insurance	18,190.00
Taxes	31,132.86
Storage expense	23,446.60
Bottling expense	22,867.98
Distilling expense	46,311.27
General expense	35,912.08
Expenses of Bradford office	3,519.59
Cases, bottles, corks, other supplies and misc.	166,749.49
Loss on Liberty Bonds	5,328.75
Total	393,058.63
Net income	\$ 845,339.86

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The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was \$158,442.84, computed in the following manner:

GROSS INCOME

Sales less returns		\$218,050.31
Less: Inventory December 31, 1919	\$121,135.00	
Inventory December 31, 1920	93,819.44	27,315.56
Total		\$190,734.75

DEDUCTIONS

Labor	8,188.92	
Taxes	2,236.44	
Depreciation	1,739.49	
Loss on Liberty Bonds	507.50	
Storage	1,211.40	
Insurance	5,528.16	
Other expenses-Bad debts, etc.	11,650.00	
Salesmen's commissions	1,230.00	
Total		32,291.91
Net income		\$158,442.84

72. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 8):

During the year 1920 the sum of \$800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In

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connection with such distributions said parties gave to A. Overholt & Co. non-interest bearing notes in the aggregate amount of \$750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes, and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A. Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

73. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 9):

During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Company, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

74. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 10):

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On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

75. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 11):

The said return showed gross income of \$169,649.13, computed in the following manner:

Sales of empty barrels	\$ 6,609.31
Bottling and casing	320,563.61
Storage	42,550.50
Total	\$369,693.42
Less: Labor	\$ 12,859.41
Revenue stamps	8,020.90
Cases, bottles, corks, etc.	150,922.31

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Water and other ex-		
penses	10,757.98	
Storage, labor, and exp.	21,264.42	203,825.02
		<hr/>
Balance		165,868.40
Interest		3,480.73
Rentals		300.00
		<hr/>
Gross income reported		\$169,649.13

Deductions of \$19,268.15, together with a loss of \$5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of \$145,052.23. \$48,350.74 of said amount was reported on the return as distributable and taxable to plaintiff; \$48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; and \$48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

76. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 12):

Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt & Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of \$646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

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Gross sale price of whiskey		\$928,273.71
Less: January 1, 1920 whiskey inventory	\$595,676.53	
December 31, 1920 whiskey inventory	498,748.49	96,928.04
Gross profit on whiskey sales		831,345.67
Less: Insurance	16,000.00	
Taxes	3,000.00	
Salesmen's salary and commission	11,726.00	
Storage	23,446.60	
United States taxes paid	9,857.70	
Distillery labor, expense and maintenance	46,791.27	
Salaries	14,302.03	
Bradford office expense	1,809.80	
Office rent and miscellaneous	3,039.02	
Adv. and other expense	55,047.46	
Claim adjustment	1.84	185,021.72
Net profit on whiskey sales		\$646,327.63

77. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 13):

Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

78. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 14):

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On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

79. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 15):

Said return showed a gross income of \$27,735.48, computed in the following manner:

Gross sales	\$47,729.00	
Cost of goods sold	20,127.92	27,601.08

Rents received		134.40
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Gross income reported	\$27,735.48
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Deductions of \$9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of \$17,881.64. \$5,960.55 of said amount was reported on the return as distributable and taxable to plaintiff; \$5,960.55 of said amount was reported on the re-

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turn as distributable and taxable to R. B. Mellon; \$5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

80. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 16):

Although a gross income of only \$27,735.48 and a net income of only \$17,881.64 was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by \$17,881.64; but by \$156,539.02, or in the amount of \$138,657.38 in excess of the net income shown on the face of the return.

81. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 17):

Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

82. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 18):

On his Federal income tax return for 1920, plaintiff included \$48,350.74 as income from the

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partnership of A. Overholt & Co., and included the sum of \$5,960.55 as income from the partnership of West Overton Distilling Company.

83. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 19):

In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name of and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by plaintiff for the year 1920. On December 20, 1922, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for 1920 of \$180,106.27. On December 16, 1926, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for the year 1920 of \$195,229.70. On February 21, 1927, the Commissioner mailed to plaintiff a final deficiency letter showing a deficiency in income tax for the year 1920 of \$190,419.70. On March 19, 1927, said deficiency of \$190,419.70, together with interest in the sum of \$12,082.52, was assessed against plaintiff. Thereafter, on or about March 23, 1927, the defendant notified plaintiff of said assessment. On or about April 2, 1927, plaintiff paid to defendant said sums of \$190,419.70 and \$12,082.52.

84. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 20):

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In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased plaintiff's share of the net income of A. Overholt & Co. for the year 1920 from \$48,350.74 to \$281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was \$845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or \$281,779.95 as plaintiff's share thereof. The Commissioner increased plaintiff's share of the net income of West Overton Distilling Company for the year 1920 from \$5,960.55 to \$52,814.28, by determining that the net income earned by West Overton Distilling Company during the year 1920 was \$158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or \$52,814.28 as plaintiff's share thereof.

85. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 21):

On or about January 20, 1923, plaintiff filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, plaintiff filed with the Commissioner a protest against the

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action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to the time of filing his claim for refund hereinafter mentioned, did plaintiff assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

86. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 22):

On or about March 19, 1929, plaintiff filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose a claim for refund for the year 1920 of \$194,160.75. In said refund claim the said plaintiff assigned the following reasons for the allowance thereof:

In my tax return for 1920 there was included in my income the amounts of \$48,350.74 and \$5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to \$281,779.95 and \$52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distributions made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on

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Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of \$281,779.95 and \$52,814.28, erroneously included by the Commissioner in income for that year.

87. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 23):

By letter dated April 16, 1932, the Commissioner of Internal Revenue advised plaintiff that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised plaintiff that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. Plaintiff, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to A. W. Mellon, the plaintiff was advised "that your proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable

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on your 1920 return," and that "accordingly, the claim will be disallowed." Plaintiff's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to A. W. Mellon.

88. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 24): -

If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by plaintiff and his brother, R. B. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been \$551,914.70, computed as follows:

Net income (as set out in Paragraph 7 hereof)	\$845,339.86
Less exemption	1,000.00
Net income subject to normal tax	\$844,339.86
Normal tax at 4% on \$4,000	\$ 160.00
Normal tax at 8% on \$840,339.86	67,227.19
Surtax on \$845,339.86	484,527.51
Total tax liability	\$551,914.70

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and R. B. Mellon, or had

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been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been \$66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)	\$158,442.84
Less exemption	1,000.00
Net income subject to normal tax	<u>\$157,442.84</u>
Normal tax at 4% on \$4,000	\$ 160.00
Normal tax at 8% on \$153,442.84	12,275.43
Surtax on \$158,442.84	<u>54,237.99</u>
Total tax liability	\$66,673.42

No such action was taken by plaintiff or R. B. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by R. B. Mellon.

89. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 25):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets

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or property out of which the aforesaid amount of \$551,914.70 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal to or in excess of the amount of \$551,914.70.

90. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 26):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of \$66,673.42 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal to or in excess of the amount of \$66,673.42.

91. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 27):

The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

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92. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 28):

The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

93. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 29):

The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

94. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 30):

A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

95. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 31):

A. W. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was \$281,779.95.

96. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 32):

A. W. Mellon's distributive share of the net

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income of the partnership of West Overton Distilling Company for the year 1920 was \$52,814.28.

97. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 33):

In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income for the year 1920 the sum of \$281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

98. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 34):

In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income in the year 1920 the sum of \$52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

99. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 35):

The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on A. W. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by

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West Overton Distilling Company in the year 1920.

100. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 36):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the Commissioners of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

101. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 37):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

102. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 38):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

103. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 39):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in

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controversy in this action were assessed and collected was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

104. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 40):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

105. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 41):

Plaintiff is estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

106. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 42):

Even though the income, on which the taxes in controversy were asserted, assessed and collected, was income of taxable trusts, as a result of the

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distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by A. W. Mellon in such distribution of money and property amounting to in excess of \$600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, A. W. Mellon, was indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount collected by the defendant from A. W. Mellon, as hereinbefore set forth.

107. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 43):

Defendant is not indebted to A. W. Mellon in any sum whatsoever.

108. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 1):

Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

109. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 2):

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As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

110. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 3):

As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

111. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 4):

Under the provisions of Section 218 of the Revenue Act of 1918, A. W. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

112. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 5):

The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

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113. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 6):

There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

114. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 7):

There is no warrant in law for the plaintiff's contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until A. W. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

115. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 8):

The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

116. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 9):

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Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

117. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 10):

Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

118. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 11):

Plaintiff is estopped to assert and claim that the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

119. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 12):

Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in

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controversy in this action were assessed and collected, was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organization for the year 1920.

120. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 13):

Plaintiff is estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against A. W. Mellon for the year 1920, was not lawfully assessed and legally collected.

121. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 14):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy, was determined, assessed and collected, A. W. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of \$187,787.17, collected by the defendant from A. W. Mellon as a deficiency in tax and the interest thereon for the year 1920.

122. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 15):

In equity and good conscience the plaintiff ought not to recover of and from the defendant herein.

123. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 16):

The taxes sought to be recovered in this action were lawfully assessed and legally collected by the Commissioner of Internal Revenue from A. W. Mellon by the defendant.

124. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 17):

The pleadings and the evidence in this case, with any inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

125. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 18):

Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

126. The Court erred in failing and refusing to find as conclusion of law as requested by the defendant that (Conclusion 19):

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The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiff's Statement of Claim, at plaintiff's costs.

127. The Court erred in disregarding all of the evidence and in adopting verbatim plaintiff's statement of claim as its findings of fact, to the extent thereof, that is to say, the Court's Findings 2, 3, 4, 5, 6 and 7 are identical with Paragraphs 2, 3, 4, 5, 6 and 7, respectively, of plaintiff's statement of claim; and, in that Finding 8 is identical with Paragraph 9 of the statement of claim except that Exhibits A and B are not made part of the findings; and, in that Findings, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are identical with Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22 and 25, respectively, of plaintiff's statement of claim; and, in that Finding 22 is substantially identical with Paragraph 26 of the statement of claim, and Finding 24 is identical with Paragraph 28 of the statement of claim.

128. The Court erred in failing to rule, prior to conclusion of the trial, on the admissibility of Defendant's Exhibits G. H. R. HH to LLL, and each of them because each and all of said Exhibits, when offered in evidence, were objected to by counsel for plaintiff and the rulings of the Court were either: "Admitted * * * and consideration given to it later"; "will admit it for the present"; "overruled for the present"; "admitted, subject to future ruling"; "admitted temporarily, subject to later ruling"; "ob-

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jection overruled for the time being"; objection overruled for the present", or "ruling will be in effect re-served"; that it does not appear by any rulings whether the Court admitted said Exhibits or any thereof in evidence and gave no credence to them in arriving at his findings, conclusions and judgment, or whether the Court excluded said Exhibits and each and every thereof from consideration as not being admissible.

WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed, and that said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's statement of claim and action brought herein.

CHARLES F. UHL,
United States Attorney.

D. LLOYD CLAYCOMB,
Assistant United States Attorney.

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(Filed May 13, 1936.)

No. 6979 Law.

AND Now, to-wit, this 13th day of May, A. D. 1936, comes the defendant D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania, by his attorney Charles F. Uhl, United States Attorney in and for the Western

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District of Pennsylvania, and, in connection with his appeal, says that in the record, proceedings, findings of fact, conclusions of law, and final judgment in said cause, manifest errors intervene to his prejudice and injury, and he assigns and relies upon the following errors to reverse the judgment entered herein:

1. The Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.
2. The Court erred in overruling defendant's motion for judgment upon conclusion of the plaintiff's case.
3. The Court erred in overruling defendant's motion for judgment made and filed at the close of all of the evidence and before submission of the case to the Court.
4. The Court erred in refusing to grant each and every part of the defendant's requests for special findings of fact and conclusions of law.
5. The Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.
6. The Court erred in admitting in evidence, over objection and exception of the defendant, two written agreements dated January 31, 1921, whereby the Union Trust Company of Pittsburgh was appointed so-called liquidating agent with respect to the partnerships A. Overholt & Co. and West Overton Distilling Company,

marked Exhibits C and D attached to plaintiff's statement of claim, for the reason that said instruments are irrelevant and immaterial because they refer to actions of the parties subsequent to 1920; that 1920 is the only tax year involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in the case.

7. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 13 of plaintiff's statement of claim reading as follows:

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that the same is irrelevant and immaterial and is not admitted by the amended affidavit of defense.

8. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 14 of plaintiff's statement of claim reading "During the period of liquidation," in the first line, and the words "liquidating trustees," for the reason that they tender conclusions of law and not statements of fact and are not admitted by the amended affidavit of defense. Said Paragraph 14, as admitted in evidence, reads as follows:

14. During the period of liquidation, from December 2, 1919 to and including the year 1925,

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no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

9. The Court erred in admitting in evidence, over objection and exception of the defendant the words in Paragraph 16 of plaintiff's statement of claim reading "while acting in the capacity of liquidating trustees" and the words "treating the same as trust properties," for the reason that the same are conclusions of law and not admitted by the amended affidavit of defense. Said Paragraph 16 as admitted by the Court reads as follows:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

10. The Court erred in admitting, over objection and exception of the defendant, Paragraph 17 of plaintiff's statement of claim, reading as follows:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt

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& Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that the same is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose, and not admitted by the amended affidavit of defense.

11. The Court erred in admitting, over defendant's objection and exception, the following portion of Paragraph 18 of plaintiff's statement of claim, with the inclusion of the word "undistributed," for the reason that the same is irrelevant and immaterial and is properly traversed by the amended affidavit of defense. Paragraph 18 as admitted by the Court, with the inclusion of said word, reads as follows:

18. In his return for said year 1920, plaintiff
• • • included as taxable profit his undistributed
share of the so-called • • • profits of A. Over-
holt & Company in the amount of \$48,350.74, and
his share of the so-called • • • profits of West
Overton Distilling Company in the amount of \$5,-
960.55 • • •.

12. The Court erred in admitting, over objection and exception of the defendant, Paragraph 20 of plaintiff's statement of claim, as follows:

20. Plaintiff duly filed tax returns for the
years 1921 to 1925, both inclusive, and for said

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years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that the same is wholly immaterial and irrelevant to any of the issues in this case and is not admitted by the amended affidavit of defense.

13. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 21 of plaintiff's statement of claim, reading as follows:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

“ ‘Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.’ ”

“ ‘Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.’ ”

for the reason that the affirmative matter set up by defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of

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plaintiff's statement of claim; and for the further reason that in any event said allegations are wholly irrelevant and immaterial.

14. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 22 of plaintiff's statement of claim reading as follows:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 and 1924, inclusive.

* * *

for the reason that the same is irrelevant and immaterial for the reasons specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that the same is not admitted by said amended affidavit of defense.

15. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 23 of plaintiff's statement of claim, reading as follows:

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of \$41,008.84 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and pay-

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ment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

“ ‘Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.’ ”

for the reason that said Paragraph 23 is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case, and is redundant and is not admitted by the amended affidavit of defense and because the amended affidavit of defense specifically alleges that a claim for refund filed by plaintiff for 1925 was still pending, undisposed of, by the Commissioner of Internal Revenue and that said 1925 claim was based, in part, on the alleged inclusion of 1920 operating profits of the partnerships.

16. The Court erred in admitting in evidence, over objection and exception of the defendant, that

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part of Paragraph 28 of plaintiff's statement of claim reading "and has also included said profits in plaintiff's income for 1925," and the last sentence of said Paragraph 28 reading "He has assessed and collected a tax on the same income in each of said years," for the reason that same are irrelevant and immaterial and because the amended affidavit of defense specifically alleges that no final action had yet been taken by the Commissioner with respect to plaintiff's income tax liability for 1925. Said Paragraph 28 as admitted in evidence, with the inclusion of said duly objected to parts, reads as follows:

28. The Commissioner of Internal Revenue has included * * * profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

17. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of the witness Hicks, on the ground that the same called for a conclusion of the witness and was not the best evidence, and was leading and suggestive:

Q. Was that carried on all through the years from 1919 to 1925?

A. Yes.

18. The Court erred in overruling defendant's objection to the following question asked by plaintiff's

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counsel of the witness Hicks, and in overruling defendant's motion to strike the following answer thereto:

Q. Was there a profit made out of bottling?

A. There was a profit made on bottling.
for the reason that said question is leading and suggestive.

19. The Court erred in overruling defendant's motion to strike the following answer of the witness Hicks to the following question:

Q. After that what did you do?

A. Decided—the partnership decided not to sell anything unless they could sell the balance of the stock to some one person or concern.
for the reason that said question is not confined to the year 1920, which is the only year in issue in this case.

20. The Court erred in overruling defendant's objection to the following questions, and in allowing the same to be answered by the witness Hicks:

Q. In 1921—or until the final sale in 1925, had you any negotiations with anyone as to the sale of the entire plant?

A. We had several inquiries. Mr. Rosensteel—I think that was in 1922, but he made us no real offer; and Mr. Pell—

Q. Mr. Pell of New York, a broker, finally made the sale?

A. Yes.

Q. And prior to the final sale had he introduced you to any other purchaser?

A. Yes, he had.

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for the reason that the same are irrelevant and immaterial.

21. The Court erred in overruling the objection of the defendant to the following question, and in allowing the same to be answered by witness Hicks:

Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?

A. No, sir.

for the reason that said question calls for a conclusion of the witness, is incompetent, irrelevant and immaterial and not the best evidence.

22. The Court erred in overruling defendant's objection to the following question, and in allowing it to be answered:

Q. Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business which might result in the expenditure of a large amount of money by distillers?

A. Yes.

for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues involved in the case, and for the further reason that the testimony or the proof offered is too general and does not establish or tend to establish the question of whether or not there were debts and contingent liabilities, or the amounts of them, and for the further reason that the offer of proof is not a ten-

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der of an issue of fact but a tender of an issue of law, and has no bearing whatsoever upon the right of the Government to levy and collect a tax for the year 1920.

23. The Court erred in refusing to sustain defendant's objection to the following questions and in overruling defendant's motion to strike the following answers thereto of the witness Hicks:

Q. Mr. Hicks, how much whiskey was there on hand in 1920?

A. It would be pretty hard to state just exactly the amount, but I would say around sixty thousand in the two distilleries.

Q. Barrels?

A. Yes.

for the reason that such testimony is not the best evidence and that the question is not confined to a specific time.

24. The Court erred in overruling defendant's motion to strike the answer of plaintiff's witness Seifert to the following question:

Q. Were you in 1920 attorney for Messrs. A. W. and R. B. Mellon in conjunction with the A. Overholt & Company and West Overton Distilling Company?

A. Mr. James H. Beal, former partner of Reed, Smith, Shaw & Beal, and myself were counsel for liquidating trustees of A. Overholt & Company and the West Overton Distilling Company during the year 1920.

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for the reason that the answer was not responsive to the question.

25. The Court erred in overruling defendant's objection to the following question, and in allowing the same to be answered by the witness Seifert:

Q. When there did you hear any rumors, definite or otherwise, in regard to certain proposed policies which the Government might adopt in regard to imposition of a floor tax on whiskey, in regard to the requiring the removal of all whiskey to concentration warehouses, and in regard to requiring all whiskey to be bottled immediately?

A. I did.

for the reason that said question is argumentative, is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness and is too general.

26. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered, and in overruling defendant's motion to strike said answer thereto:

Q. Did you as attorney for Messrs. A. W. and R. B. Mellon advise them or their associate in regard to the distribution of profits or of the profits from the sale of whiskey of the two former partnerships, A. Overholt & Company and West Overton Distilling Company?

A. As counsel with Mr. James H. Beal, we advised Mr. R. B. Mellon, who was the managing partner of A. Overholt & Company, partnership—

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managing partner of the surviving partners, A. W. Mellon and R. B. Mellon, of the West Overton Distilling Company and A. Overholt & Company, that no distribution could be made until certain questions had been settled—as definitely as we as counsel could advise them—about a possible floor tax, possible expense and tax involved in removing the whiskey to Government warehouses, should the Government require that, possible tax and expense involved in bottling the whiskey which was then in the distilleries at West Overton and A. Overholt & Company's plant at Broadford.

for the reason that the question is irrelevant and immaterial and not binding on the defendant and, with respect to the motion to strike, for the reason that the answer is not responsive but is argumentative and invades the province of the Court, and does not tend to prove or disprove any issue involved in this case.

27. The Court erred in overruling defendant's motion to strike the following question and answer thereto of the witness Seifert:

Q. Would these matters have involved any amount of money, if they had been adopted by the Government?

A. They would have involved very large sums of money, sums of money larger than the company at that time would have been—or sums larger than the surviving partners at that time would have been able to have taken care of out of the then assets of the partnership.

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for the reason that the question calls for a conclusion of the witness and the answer is a conclusion, and neither tends to prove or disprove any issue in the case.

28. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing it to be answered:

Q. Did the fact that a tax might be assessed on all whiskey, either as a floor tax or as an Internal Revenue tax upon bottling, enter into your consideration in giving your advice to Messrs. A. W. and R. B. Mellon?

A. It certainly did.

for the reason that the same is incompetent, irrelevant and immaterial.

29. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following questions:

Q. Do you personally know whether the Commissioner declared a deficiency in income tax against the two corporations for any of the years 1916, '17 or '18?

A. I know that the Commissioner—

Q. Just answer whether you know or not.

A. If you mean by "asserting deficiency" proposing deficiency in letters which were addressed to the corporations, I will answer that question yes.

for the reason that the answer is not responsive.

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30. The Court erred in overruling defendant's objection to the following questions asked of the witness Seifert, and in allowing the same to be answered:

Q. Approximately what do they amount to?

A. About \$550,000 for the years '16, '17 and '18.

for the reason that it is immaterial and irrelevant to the issues involved in this case what deficiencies may have been asserted or determined prior to the year 1920.

31. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered:

Q. When that distribution was made, did you or did you not advise them with respect to the unpaid income taxes and whether or not any part should be retained to meet those payments when they were demanded.

A. Yes, sir.

for the reason that the same is incompetent, irrelevant and immaterial, as well as leading.

32. The Court erred in overruling defendant's motion to strike the following question and answer with respect to the witness Seifert:

Q. What was your advice to the surviving partners in the year 1925?

A. Our advice was that no distribution of any of the assets of the partnership could be made until all debts had been discharged and all possible contingent liabilities disposed of.

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for the reason that the same is incompetent, irrelevant, immaterial and, in any event, the answer is not responsive to the question and cannot bind the defendant.

33. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following question:

Q. In the year 1925, I mean.

A. In the year 1925, as the assets had been disposed of in bulk, we advised that distribution could then be made of everything except what might be necessary to take care of undisposed of Federal income and excess profits tax liabilities. for the reason that the same is immaterial and incompetent.

34. The Court erred in overruling defendant's motion to strike the entire testimony of plaintiff's witness Seifert, for the reason that said testimony does not prove or tend to prove any issue involved in this case; the testimony is argumentative, an expression of conclusions by the witness, and is incompetent, irrelevant and immaterial.

35. The Court erred in refusing to admit in evidence, as an admission by plaintiff because of insufficient denial thereof, the following portion of Paragraph 11 of defendant's second defense to plaintiff's statement of claim and in sustaining plaintiff's objection thereto:

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to

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their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company.

36. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of the following offer of proof by defendant's witness Updike, after being duly qualified:

The result of a computation of the tax of the plaintiff for the year 1925, in accordance with Bureau letter dated March 15, 1929, in evidence, eliminating yearly gains and losses for the period from December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income which would show that plaintiff underpaid his tax for the year 1925, admitting for said purpose everything contended for by plaintiff. It was offered to rebut plaintiff's allegation in Paragraph 28 of its statement of claim that there resulted, by reason of the assertion of a deficiency for 1925, double taxation on the same income, namely, for 1920 and 1925, defendant offered to show by this computation and proof that there has been no double taxation; that such computation was also offered in rebuttal of the latter allegation in the statement of claim. The Court was advised that said Paragraph 28 of the statement of claim was one of the paragraphs to which defendant made objection on the ground that it is irrelevant and immaterial and on which defendant says that if the Court

decides adversely to defendant's contention in that respect, then defendant is left without any proof rebutting the inference of the allegation in the statement of claim. The Court was also advised that the proof would show that, taking the amount determined by the Commissioner as the amount for 1925, which plaintiff now contends included the incomes for 1920 and the incomes and losses for the intervening years, that defendant proposed to deduct those amounts in this computation and to show that the tax on the remainder amounts to more than the plaintiff claims he is entitled to have refunded for 1925.

37. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of defendant's offer to prove by the witness Updike that a computation of the tax of R. B. Mellon for 1925, in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period December 1, 1919 to December 31, 1924, and taking the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that the plaintiff R. B. Mellon has underpaid his tax for the year 1925 in the amount of \$48,232.62.

38. The Court erred in allowing the witness Banks to answer, over defendant's objection, the following question interposed by plaintiff's counsel during re-direct examination:

Q. Were there additional repayments in the year 1922?

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A. In the year 1922 the ledger account shows \$90,000 repaid to the partnership by the individuals.

39. The Court erred in not ruling, prior to conclusion of the trial, on the admissibility of the testimony of the witness Banks, because all of his testimony was objected to by plaintiff and parts objected to by defendant and all of the Court's ruling were: "overruled for the present"; that it does not appear by any rulings whether the Court considered the witness's testimony as admitted and disbelieved by him or excluded consideration of said testimony in arriving at his findings, conclusions and judgment.

40. The Court erred in admitting in evidence, over defendant's objection and exception, Plaintiff's Exhibit No. 5, being a certified copy of decree of the Orphans' Court of Allegheny County, entered December 24, 1931, respecting final distribution of the Estate of Henry C. Frick, for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issues involved in this case. It is mere hearsay and is not binding on the defendant and not proper rebuttal.

41. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of its rebuttal witness Buchanan, and in allowing the same to be answered:

Q. In connection with income and estate tax on the Estate of Henry C. Frick, did you have up with the Bureau of Internal Revenue at Washing-

ton the question of the taxes growing out of the liquidation of A. Overholt & Company and the West Overton Distilling Company?

A. I did.

for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue involved in the case, and is not proper rebuttal testimony and for the further reason that the basis for computing the gain or loss in connection with arriving at the income tax due from an estate is on a different basis and under a different statute entirely from that involving individuals, and the basis of values is entirely different; and this offer of testimony has no relevancy or materiality to any of these issues. The Estate of Henry C. Frick is not a party to this proceeding, and is not involved, and any action that the Commissioner may have taken with reference to that taxpayer, if it should be erroneous, does not preclude the Commissioner from taking a correct action against some other taxpayer.

42. The Court erred in overruling defendant's objection to the following question asked by plaintiff of his rebuttal witness Buchanan, and in allowing the same to be answered:

Q. When was the settlement made with the Bureau of Internal Revenue in connection with Mr. Frick's income taxes on this liquidation?

A. In the year 1928.

for the same reasons as given in support of the immediately previous objection.

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43. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 6, being a copy of a letter addressed to the witness Buchanan as counsel for the Estate of Henry C. Frick, covering the income tax liability of the Frick Estate from December 3, 1919 to the end of 1923, for the reason that the same is not the original and is incompetent, irrelevant and immaterial, and for the further reasons assigned in support of the two immediately preceding objections.

44. The Court erred in overruling defendant's objection to the following question and in allowing the same to be answered by plaintiff's witness Buchanan, and in overruling defendant's motion to strike the following answer thereto as not being responsive and being incompetent, irrelevant and immaterial:

Q. That is what I meant. And did you reach any understanding or agreement with respect to settlement on that basis?

A. Before or in the course of the hearings on the question of A. Overholt & Company income in Washington, in the case of the Estate of H. C. Frick, I conferred with Mr. Seifert as attorney for the other partners of that firm, and I was authorized by Mr. Seifert to say that the ruling made in the case of the Estate of H. C. Frick could be made also in the cases of the other two partners, which had not yet been reached in audit, as I understood. I so advised the conference in Washington.

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45. The Court erred in overruling defendant's objections to the following questions asked by plaintiff of the witness Buchanan, and in allowing the same to be answered:

Q. What was the ruling in 1925—as to 1925 income?

A. Shall I read into the record the ruling?

Q. Yes.

A. The ruling for 1925 is somewhat lengthy. It begins this way: "The following adjustments have been made in net capital gain as set up in Exhibit 'B' revised"—Perhaps I can show it to the attorney for the United States and have it copied into the record instead of reading all these figures.

for the same reasons as noted in support of the four immediately previous objections.

46. The Court erred in overruling defendant's objection to the following questions asked of the witness Buchanan, and in allowing the same to be answered:

Q. Well, can you give us the effect of that ruling?

A. The amount received by the estate in 1925—

Q. Just a moment. I mean the basis for the ruling; can you give that?

A. That is what I am trying to give. The amount received by the estate in liquidation in 1925 was shown, and the cost of the decedent's interest based on an amended balance sheet of

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December 2, 1919, and giving effect to adjustments made in the audit of the 1918 return, was shown; a comparison of those two figures showed a profit. A similar comparison in the case of the West Overton Distilling Company showed a profit; and these profits were shown in net capital gain. I would like to make this explanation, however: that this was not the final letter received by the Estate of H. C. Frick, which did not come until February of 1928. On account of other adjustments in tax liability, the taxpayer did not elect to take advantage of capital gain rates, because there would be no advantage in doing so, and therefore the ultimate tax was not at capital gain rates.

for the reason that the questions call for a conclusion of the witness.

47. The Court erred in overruling defendant's motion to strike all the testimony of plaintiff's rebuttal witness Buchanan for the reason that the same is incompetent, irrelevant, and immaterial, hearsay, and not binding on the defendant, and not proper rebuttal testimony, not tending to prove or disprove any issue involved in this case.

48. The Court erred in finding as a matter of fact that (Finding No. 5):

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined

in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$175,259.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is vague, indefinite, misleading and contrary to the undisputed evidence, in that, as shown by defendant's Exhibit F, said letter of February 21, 1927 was a sixty-day deficiency letter advising plaintiff that there appeared to be a deficiency in tax for 1920 of \$175,259.70 and advising him of his right to appeal from said determination by the filing of his petition with the Board of Tax Appeals within sixty days, and that said tentative determination of deficiency resulted from the Commissioner including in plaintiff's individual income his distributive share in the net income of the partnerships A. Overholt & Company and West Overton Distilling Company, with the inclusion in the net income of said partnerships of profit on sales of whiskey by each of said partnerships, which profit plaintiff had omitted in his individual income tax return for 1920.

49. The Court erred in finding as a matter of fact that (Finding No. 6):

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commission-

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er had assessed the deficiency in tax of \$175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$175,259.70 together with interest thereon of \$12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

for the reason that there is no substantial evidence in the record to support said finding, in that there is no evidence respecting the collection of said deficiency assessment under threats or duress. The evidence clearly shows that payment of said assessment was voluntarily made.

50. The Court erred in finding as a matter of fact that (Finding No. 7):

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$175,259.70 and \$12,527.47 for the reason that there is no substantial evidence in the record to support said finding.

51. The Court erred in finding as a matter of fact that (Finding No. 9):

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever exist-

ed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

for the reason that there is no substantial evidence in the record to support said finding.

52. The Court erred in finding as a matter of fact that (Finding No. 10):

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 11 of plaintiff's statement of claim, the latter portion of which paragraph was duly denied by defendant in his amended affidavit of defense.

53. The Court erred in finding as a matter of fact that (Finding No. 11):

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11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 12 of plaintiff's statement of claim which specifically denies said paragraph and alleges that said partnerships' books and records for the year 1920 were kept by the accrual method of accounting.

54. The Court erred in finding as a matter of fact that (Finding 12):

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 13 of plaintiff's statement of claim, which paragraph is not admitted by the defendant's amended affidavit of defense.

55. The Court erred in finding as a matter of fact that (Finding No. 13):

13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trus-

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tees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 14 of plaintiff's statement of claim, which is duly traversed by Paragraph 14 of defendant's amended affidavit of defense.

56. The Court erred in finding as a matter of fact that (Finding No. 14):

14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial and contrary to the undisputed evidence, in that the testimony of defendant's witness Banks relative to the books of the A. Overholt & Company and defendant's Exhibit MMM, being copy of accounts receivable of the A. Overholt & Company, showed distributions in fact to have been made by the A. Overholt & Company to A. W. and R. B. Mellon and the Frick Estate during 1920.

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57. The Court erred in finding as a matter of fact that (Finding No. 15):

15. Plaintiff and A. W. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 16 of plaintiff's statement of claim, which is not admitted by defendant's amended affidavit of defense.

58. The Court erred in finding as a matter of fact that (Finding 16):

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the year 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial, as specifically set forth in Paragraph 17 of the defendant's amended affidavit of defense.

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59. The Court erred in finding as a matter of fact that (Finding No. 17):

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28, respectively.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 17 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 17 of defendant's amended affidavit of defense.

60. The Court erred in finding as a matter of fact that (Finding No. 18):

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is substantially identical in language with Paragraph 20 of plaintiff's statement of claim, is wholly immaterial as speci-

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fically set forth in Paragraph 20 of defendant's amended affidavit of defense.

61. The Court erred in finding as a matter of fact that (Finding No. 19):

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 21 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 21 of defendant's amended affidavit of defense.

62. The Court erred in finding as a matter of fact that (Finding No. 20):

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received

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in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 22 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that said finding is contrary to the undisputed evidence, in that, after defendant with leave of Court amended his amended affidavit of defense so as to specifically deny the allegations of the second sentence of said Paragraph 22 in the statement of claim, being identical with the second sentence of the Court's finding No. 20, and it was shown by the testimony of the witness Banks and by defendant's Exhibit MMM that the amounts actually received in liquidation in 1925 did not include the amounts distributed during 1920 and succeeding years immediately prior to final liquidation of said partnerships.

63. The Court erred in finding as a matter of fact that (Finding No. 21):

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of \$175,259.70 and \$12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and

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collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 25 of plaintiff's statement of claim, is duly traversed by Paragraph 25 of defendant's amended affidavit of defense.

64. The Court erred in finding as a matter of fact that (Finding No. 23):

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding is wholly immaterial.

65. The Court erred in finding as a matter of fact that (Finding No. 24):

24. The Commissioner of Internal Revenue has included liquidating profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

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for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding, which is identical in language with Paragraph 28 of plaintiff's statement of claim, is wholly immaterial for the reasons specifically set forth in Paragraph 28 of defendant's amended affidavit of defense.

66. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 1):

The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim herein was filed on October 24, 1933, by R. B. Mellon, a resident of the City of Pittsburgh, Allegheny County, Pennsylvania. The said R. B. Mellon died testate on or about December 1, 1933, and the duly qualified executors and executrices of his estate are Jennie King Mellon, Richard King Mellon and Sarah Mellon Scaife, all residents of Pittsburgh, Pennsylvania, and the Union Trust Company of Pittsburgh, a corporation doing business in Pittsburgh, Pennsylvania, all of whom by order of Court have been substituted as parties plaintiff herein.

67. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 3):

During the year 1920, R. B. Mellon kept his books and records and filed his income tax return for said year on the cash receipts and disburse-

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ments method of accounting. On or about the fifteenth day of March, 1921, R. B. Mellon filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was \$406,673.28, which amount was duly assessed and paid.

68. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 4):

On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania; true and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon and Henry C. Frick had equal one-third interests in each of said partnerships.

69. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 5):

On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partnership of A. Overholt & Co. At or about the same time

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the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spirituous liquors stored in bonded warehouses.

70. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 6):

The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spirituous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of account.

71. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 7):

Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was \$845,339.86, computed in the following manner:

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Gross Income

Whiskey sales, not less than.....	\$928,273.71	
Less: January 1, 1920 whiskey inventory	\$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04

Gross profit on whiskey sales	831,345.67
Sales of empty barrels, not less than	6,609.31
Charges for bottling and casing, not less than....	320,533.61
Storage charges, not less than	42,550.50
Other operating income not allocated	33,578.67
Interest received	3,480.73
Rents received	300.00
Total	\$1,238,398.49

Deductions

Salaries and wages.....	39,600.01
Insurance	18,190.00
Taxes	31,132.86
Storage expense	23,446.60
Bottling expense	22,867.98
Distilling expense	46,311.27
General expense	35,912.08
Expenses of Bradford office	3,519.59

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Cases, bottles, corks, other supplies and mise.....	166,749.49	
Loss on Liberty Bonds....	5,328.75	
		<hr/>
Total		393,058.63

Net income \$845,339.86

The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was \$158,442.84, computed in the following manner:

Gross Income

Sales less returns	\$218,050.31	
Less: Inventory December 31, 1919	\$121,135.00	
Inventory December 31, 1920	93,819.44	27,315.56
		<hr/>

Total \$190,734.75

Deductions

Labor	8,188.92	
Taxes	2,236.44	
Depreciation	1,739.49	
Loss on Liberty Bonds....	507.50	
Storage	1,211.40	
Insurance	5,528.16	
Other expenses—Bad debts, etc.	11,650.00	
Salesmen's commissions..	1,230.00	
		<hr/>

Total 32,291.91

Net income \$158,442.84

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72. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 8)—

During the year 1920 the sum of \$800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In connection with such distributions said parties gave to A. Overholt & Co. non-interest bearing notes in the aggregate amount of \$750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A. Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

73. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 9):

During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Com-

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pany, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

74. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 10):

On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

75. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 11):

The said return showed gross income of \$169,649.13, computed in the following manner:

Sales of empty barrels.....	\$ 6,609.31
Bottling and casing	320,563.61
Storage	42,550.50
Total	<hr/> 369,693.42

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Less: Labor	\$ 12,859.41	
Revenue stamps ...	8,020.90	
Cases, bottles, corks, etc.	\$150,922.31	
Water and other ex- penses	10,757.98	
Storage, labor, and exp.	21,264.42	203,825.02
		<hr/>
Balance		\$165,868.40
Interest		3,480.73
Rentals		300.00
		<hr/>

Gross income reported 169,649.13
Deductions of \$19,268.15, together with a loss of \$5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of \$145,-\$52.23. \$48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; \$48,350.74 of said amount was reported on the return as distributable and taxable to A. W. Mellon; and \$48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

76. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 12):

Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt &

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Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of \$646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

Gross sale price of whiskey	\$928,273.71	
Less: January 1, 1920 whiskey inventory	\$595,676.53	
December 31, 1920 whiskey inventory	498,748.49	96,928.04

Gross profit on whiskey sales		831,345.67
Less: Insurance	16,000.00	
Taxes	3,000.00	
Salesmen's salary & commission	11,726.00	
Storage	23,446.60	
United States taxes paid	9,857.70	
Distillery labor, expense and maintenance	46,791.27	
Salaries	14,302.03	
Bradford office expense	1,809.80	
Office rent and miscellaneous	3,039.02	
Adv. and other expense	55,047.46	
Claim adjustment....	1.84	185,021.72
Net profit on whiskey sales.		\$646,327.63

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77. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 13):

Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

78. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 14):

On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

79. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 15):

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Said return showed a gross income of \$27,735.48, computed in the following manner:

Gross sales	\$47,729.00
Cost of goods sold.....	20,127.92
	\$27,601.08

Rents received	134.40
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Gross income reported ..	\$27,735.48
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Deductions of \$9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of \$17,881.64. \$5,960.55 of said amount was reported on the return as distributable and taxable to R. B. Mellon; \$5,960.55 of said amount was reported on the return as distributable and taxable to A. W. Mellon; \$5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

80. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 16):

Although a gross income of only \$27,735.48 and a net income of only \$17,881.64, was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by \$17,881.64, but by \$156,539.02, or in the amount of \$138,657.38 in excess of the net income shown on the face of the return.

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81. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 17):

Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

82. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 18):

On his Federal income tax return for 1920 R. B. Mellon included \$48,350.74 as income from the partnership of A. Overholt & Co., and included the sum of \$5,960.55 as income from the partnership of West Overton Distilling Company.

83. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 19):

In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name or and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by R. B. Mellon for the year 1920. On December 20, 1922, the Commissioner mailed to R. B. Mellon a preliminary letter showing a deficiency for 1920 of \$174,422.45. On December 16, 1926, the Commis-

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sioner mailed to R. B. Mellon a preliminary letter showing a deficiency for the year 1920 of \$181,298.64. On February 21, 1927, the Commissioner mailed to R. B. Mellon a final deficiency letter showing a deficiency in income tax for the year 1920 of \$175,259.70. On May 5, 1927, said deficiency of \$175,259.70, together with interest in the sum of \$12,527.47, was assessed against R. B. Mellon. Thereafter, on or about May 10, 1927, the defendant notified R. B. Mellon of said assessment. On or about May 19, 1927, R. B. Mellon paid to defendant said sums of \$175,259.70 and \$12,527.47.

84. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 20):

In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased R. B. Mellon's share of the net income of A. Overholt & Co. for the year 1920 from \$48,350.74 to \$281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was \$845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount or \$281,779.95 as R. B. Mellon's share thereof. The Commissioner increased R. B. Mel-

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lon's share of the net income of West Overton Distilling Company for the year 1920 from \$5,960.55 to \$52,814.28, by determining that the net income earned by West Overton Distilling Company during the year 1920 was \$158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or \$52,814.28 as R. B. Mellon's share thereof.

85. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 21):

On or about January 19, 1923, R. B. Mellon filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, R. B. Mellon filed with the Commissioner a protest against the action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to the time of filing his claim for refund hereinafter mentioned, did R. B. Mellon assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

86. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 22):

On or about March 19, 1929, R. B. Mellon filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that pur-

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pose a claim for refund for the year 1920 of \$187,787.17, to-wit, the aforesaid sum of \$175,259.70 additional tax and \$12,527.47 interest. In said refund claim the said R. B. Mellon assigned the following reasons for the allowance thereof:

In my tax return for 1920 there was included in my income the amounts of \$48,350.74 and \$5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to \$281,779.95 and \$52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners' individual incomes for these years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of \$281,779.95 and \$52,814.28, erroneously included by the Commissioner in income for that year.

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87. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 23):

By letter dated April 16, 1932, the Commissioner of Internal Revenue advised R. B. Mellon that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised R. B. Mellon that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. R. B. Mellon, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to the Estate of R. B. Mellon, the plaintiffs were advised "that Mr. Mellon's proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable in his 1920 return," and that "Accordingly, the claim will be disallowed." R. B. Mellon's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to the Estate of R. B. Mellon.

88. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 24):

Assignment of Errors.

If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been \$551,914.70, computed as follows:

Net Income (as set out in Paragraph 7 hereof)	\$845,339.86
Less exemption	1,000.00
<hr/>	
Net income subject to normal tax	\$844,339.86
Normal tax at 4% on \$4,000	160.00
Normal tax at 8% on \$840,-	
339.86	67,227.19
Surtax on \$845,339.86	484,527.51
<hr/>	
Total tax liability	\$551,914.70

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been \$66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)	\$158,442.84
Less exemption	1,000.00
<hr/>	
Net income subject to normal tax	\$157,442.84

Assignment of Errors.

Normal tax at 4% on \$4,000..\$	160.00
Normal tax at 8% on \$153,-	
442.84	12,275.43
Surtax on \$158,442.84	54,237.99
	<hr/>
Total tax liability	\$66,673.42

No such action was taken by R. B. Mellon or A. W. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by R. B. Mellon.

89. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 25):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of \$551,914.70 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of \$551,914.70.

90. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 26):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of \$66,673.42 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of \$66,673.42.

91. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 27):

The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the Estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

92. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 28):

The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

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93. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 29):

The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

94. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 30):

A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

95. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 31):

R. B. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was \$281,779.95.

96. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 32):

R. B. Mellon's distributive share of the net income of the partnership of West Overton Distilling Company for the year 1920 was \$52,814.28.

97. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 33):

In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of In-

Assignment of Errors.

ternal Revenue properly included in R. B. Mellon's taxable income for the year 1920 the sum of \$281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

98. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 34):

In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of Internal Revenue properly included in R. B. Mellon's taxable income in the year 1920 the sum of \$52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

99. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 35):

The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by West Overton Distilling Company in the year 1920.

100. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 36):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the

Assignment of Errors.

Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

101. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 37):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

102. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 38):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

103. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 39):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

104. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 40):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes

in controversy in this action were assessed and collected was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

105. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 41):

Plaintiffs are estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

106. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 42):

Even though the income on which the taxes in controversy were asserted, assessed and collected was income of taxable trusts, as a result of the distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by R. B. Mellon in such distribution of money and property amounting to in excess of \$600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, R. B. Mellon was

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indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount collected by the defendant from R. B. Mellon as hereinbefore set forth.

107. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 43):

Defendant is not indebted to R. B. Mellon, or any or all of the plaintiffs, or either of them, in any sum whatsoever.

108. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 1):

Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

109. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 2):

As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

110. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 3):

Assignment of Errors.

As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

111. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 4):

Under the provisions of Section 218 of the Revenue Act of 1918, R. B. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

112. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 5):

The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

113. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 6):

There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

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114. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 7):

There is no warrant in law for the plaintiffs' contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until R. B. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

115. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 8):

The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

116. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 9):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

117. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 10):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

118. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 11):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

119. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 12):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organizations for the year 1920.

Assignment of Errors.

120. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 13):

Plaintiffs are estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against R. B. Mellon for the year 1920, was not lawfully assessed and legally collected.

121. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 14):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy was determined, assessed and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of \$187,787.17, collected by the defendant from R. B. Mellon as a deficiency in tax and interest thereon for the year 1920.

122. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 15):

In equity and good conscience the plaintiffs ought not to recover of and from the defendant herein.

123. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 16):

Assignment of Errors.

The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from R. B. Mellon.

124. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 17):

The pleadings, and the evidence in this case, with every inference that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

125. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 18):

Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiffs and against the defendant.

126. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 19):

The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiffs' statement of claim, at plaintiffs' costs.

127. The Court erred in disregarding all of the evidence and in adopting verbatim plaintiff's statement of claim as its findings of fact, to the extent

Assignment of Errors.

thereof, that is to say, the Court's Findings 2, 3, 4, 5, 6 and 7 are identical with Paragraphs 2, 3, 4, 5, 6 and 7, respectively, of plaintiff's statement of claim; and, in that Finding 8 is identical with Paragraph 9 of the statement of claim, except that Exhibits A and B are not made part of the findings; and, in that Findings 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are identical with Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22 and 25, respectively, of plaintiff's statement of claim; and, in that Finding 22 is substantially identical with Paragraph 26 of the statement of claim, and Finding 24 is identical with Paragraph 28 of the statement of claim.

128. The Court erred in failing to rule, prior to conclusion of the trial, on the admissibility of Defendant's Exhibits G, H, R, HH to LLL, and each of them because each and all of said Exhibits, when offered in evidence, were objected to by counsel for plaintiff and the rulings of the Court were either: "Admitted * * * and consideration given to it later"; "will admit it for the present"; "overruled for the present"; "admitted, subject to future ruling"; "admitted temporarily, subject to later ruling"; "objection overruled for the time being"; "objection overruled for the present", or "ruling will be in effect reserved"; that it does not appear by any rulings whether the Court admitted said Exhibits or any thereof in evidence and gave no credence to them in arriving at his findings, conclusions and judgment, or whether the Court excluded said Exhibits and each and every thereof from consideration as not being admissible.

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WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed, and that said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's statement of claim and action brought herein.

CHARLES F. UHL,
CHARLES F. UHL,
United States Attorney.

D. LLOYD CLAYCOMB,
D. LLOYD CLAYCOMB,
Assistant United States Attorney.

*Bill of Exceptions.***Bill of Exceptions.**

(Filed June 30, 1936.)

**IN THE DISTRICT COURT OF THE UNITED
STATES.****FOR THE WESTERN DISTRICT OF PENNSYLVANIA.****A. W. MELLON,***Plaintiff,*

v.

**D. B. HEINER, Individually and
as former Collector of Internal
Revenue for the Twenty-Third
District of Pennsylvania,***Defendant.*

No. 6980 Law.

**JENNIE KING MELLON, RICHARD
KING MELLON, SARAH MELLON
SCAIFE and THE UNION TRUST
COMPANY OF PITTSBURGH, Ex-
ecutors of the ESTATE OF R. B.
MELLON, Deceased,***Plaintiffs,*

v.

**D. B. HEINER, Individually and
as former Collector of Internal
Revenue for the Twenty-Third
District of Pennsylvania,***Defendant.*

No. 6979 Law.

BE IT REMEMBERED, that on the trial of the above
causes, which were duly consolidated therefor, which

trial commenced on October 29, 1934, and ended on October 31, 1934, in this Court, at the May term, A. D. 1934, of said Court, the Honorable Robert M. Gibson, Judge, sitting without a jury, trial by jury having been expressly waived in each case by stipulation in the record, William A. Seifert, Esquire, John G. Frazer, Esquire, W. W. Booth, Esquire, and D. D. Shepard, Esquire, appearing as attorneys for plaintiffs, Horatio S. Dumbauld, Esquire, United States Attorney, D. Lloyd Claycomb, Esquire, Assistant United States Attorney, M. H. Eustace, Esquire, Special Assistant to the Attorney General, George H. Zentzius, Esquire, Special Assistant to the Attorney General, and E. L. Updike, Esquire, Bureau of Internal Revenue, appearing as counsel for defendant, the following proceedings were had:

The plaintiffs in said consolidated causes, to sustain the issues upon their part, offered the following as their evidence in chief:

Mr. Booth:

If the Court please, plaintiff offers in evidence the following paragraphs of the statement of claim in No. 6980 Law, A. W. Mellon vs. Heiner, which have been admitted or not denied in the affidavit of defense:

Paragraph 1:

1. Plaintiff, A. W. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

Paragraph 2:

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the

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first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

Paragraph 3:

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

Paragraph 4:

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania his income tax return for the calendar year 1920, and upon the dates appointed by law duly paid to said Collector and to defendant the tax of \$919,777.86 shown by said return to be due to the Government of the United States, as follows:

March 15, 1921	\$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of overpayment of 1917 tax)	9,650.69
December 15, 1921	229,944.48

\$919,777.86

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Paragraph 5:

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$190,419.70 was disclosed.

Paragraph 6:

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$190,419.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$190,419.70 together with interest thereon of \$12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

Paragraph 7, as qualified by the affidavit of defense as to dates:

7. On or about April 2, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$190,419.70 and \$12,082.52.

Paragraph 9:

9. On or about December 12, 1918, plaintiff, his brother R. B. Mellon and H. C. Frick entered into two separate written partnership agreements

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to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made a part hereof and marked Exhibits "A" and "B", respectively.

Mr. Booth:

I offer in evidence the said Exhibits "A" and "B" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Booth:

Paragraph 10, as admitted by the affidavit of defense:

10. Henry C. Frick died on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

Mr. Eustace:

If the Court please, defendant objects to the interpretation of the admission in Paragraph 10 of the statement of claim, in which the defendant uses the following language:

In answer to the allegations contained in Paragraph 10 of the statement of claim, defendant ad-

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mits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between the plaintiff and Richard B. Mellon, or between said parties and the personal representatives of Henry C. Frick.

The remainder of the answer to Paragraph 10 is set up in the way of affirmative matter.

The Court:

Well, the facts as alleged in Paragraph 10, however, are not denied. You have simply attached to it a paragraph which denies the effect which the plaintiff later claims, but that is a mere matter of a legal proposition. This does not deny the allegations of Paragraph 10 at all.

Mr. Eustace:

We merely wanted to call attention to the qualification.

The Court:

Yes, I notice that. They later assume a dissolution, which is a mere matter of law, upon which of course you may be heard later, if you want to. But it is not a denial of the actual facts.

Mr. Booth:

The last sentence of Paragraph 11:

11. * * * By written agreement dated January 31, 1921, the liquidating trustees appointed the Union Trust Company of Pittsburgh liquidating agent, to carry out the liquidation of the assets and

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businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D" respectively.

I offer in evidence Exhibits "C" and "D" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Eustace:

At this time, if the Court please, the offer is objected to, as irrelevant and immaterial, for the reason that it refers to actions of the parties after the year 1920. One of the defenses interposed, and which we hope to sustain, is that the tax for the year 1920 is the only tax involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in these cases.

The Court:

The objection is overruled for the present, and an exception noted.

Mr. Booth:

I offer in evidence Paragraph 13, as not being specifically denied:

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

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Mr. Eustace:

To that offer defendant objects, for the reason it is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence the averments of Paragraph 14 of the statement of claim, as not being specifically denied:

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

Mr. Eustace:

At this time defendant objects to the inclusion of that part of paragraph 14 of the statement of claim "during the period of liquidation," in the first line, and in the third line "liquidating trustees," for the reason that they tender conclusions of law and not statements of fact.

The Court:

That objection is overruled for the present. Of course it requires a later determination of the status

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of those particular persons named, but it is overruled for the present, subject to an exception.

Mr. Eustace:

Exception, of course.

Mr. Booth:

I offer Paragraph 16, for the same reason:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

Mr. Eustace:

Same objection to those portions of Paragraph 16 of the statement of claim, in the latter part of the first line and the first part of the second line, the words "while acting in the capacity of liquidating trustees," and the last two words in the third line and first four words of the fourth line, "treating the same as trust properties," for the reason that they are conclusions of law.

The Court:

Objection overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 17:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by

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holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

Mr. Eustace:

Objection is made to the entire Paragraph 17 in the statement of claim, for the reason that it is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 18, with the omission of certain words denied by the affidavit:

18. In his return for said year 1920, plaintiff
• • • included as taxable profit his undistributed
share of the so-called • • • profits of A. Overholt
& Company in the amount of \$48,350.74, and his
share of the so-called • • • profits of West Over-
ton Distilling Company in the amount of \$5,960.55
• • •

Mr. Eustace:

As to the word "undistributed" in the last line on page 5 of the statement, that is objected to as irrelevant and immaterial.

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The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 19:

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28 respectively.

Paragraph 20:

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

Mr. Eustace:

Defendant objects to the admission of Paragraph 20 of the statement of claim as read, for the reason that it is wholly immaterial and irrelevant to any of the issues in this case.

The Court:

The objection is overruled for the present, and exception noted.

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Mr. Booth:

I offer Paragraph 21:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.

Mr. Eustace:

That is objected to, for the reason that the affirmative matter set up by the defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of the statement of claim; and for the further reason that said allegations are wholly irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 22:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year

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1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

Mr. Eustace:

To which offer objection is made, for the reason that the last sentence read by counsel is specifically denied in the last sentence of Paragraph 22 of the amended affidavit of defense; and for the further reason that the matter alleged in Paragraph 22 of the statement of claim is irrelevant and immaterial.

The Court:

It doesn't seem to be a specific denial of that last sentence.

Mr. Booth:

If the Court please, it is a specific denial in that it uses the exact words of the statement of claim, but under the decisions of Pennsylvania under the Practice Act it does not constitute, in our opinion, as we submit, a specific denial. It may be they did not include all the profits, but they have to go one step further and say whether or not they included any profits. In other words, if I am sued for \$1,000, and I in my affidavit set forth that I did not owe the plaintiff \$1,000,

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that has been held not to be good; I have to go one step further and say whether I owe him \$800 or whether I owe him nothing. They have not denied that they have not included any of the profits.

The Court:

Well, the objection is overruled for the present, and exception noted.

(The Court later in the trial, upon motion of the defendant for leave to amend his affidavit of defense in answer to Paragraph 22 of the statement of claim, allowed an amendment in answer to the second or last sentence of Paragraph of said statement of claim, as will hereinafter appear.)

Mr. Booth:

I offer Paragraph 23:

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of \$48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said part-

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nerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.

Mr. Eustace:

To which offer the defendant objects, for the reason that Paragraph 23 of the statement of claim is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case, and as redundant.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 25, as far as admitted:

25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of \$194,160.75 for the year 1920.

Paragraph 26:

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon

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either as to the allowance or the disallowance of said refund.

Mr. Booth:

I call the Court's attention to the fact that the statement of claim, as shown by the record, was filed October 24, 1933, and that on that date this statement was true, although it is not true now.

Paragraph 28:

28. The Commissioner of Internal Revenue has included * * * profits of \$281,779.95 and \$52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

Mr. Eustace:

Objection is made to that part of Paragraph 28 of the statement of claim reading "and has also included said profits in plaintiff's income for 1925," for the reason that it is irrelevant and immaterial; and also the last sentence of Paragraph 28, reading "He has assessed and collected a tax on the same income in each of said years," for the reason that that allegation is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

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Mr. Booth:

In the case of Estate of R. B. Mellon vs. Heiner, No. 6979 Law, I offer in evidence the following paragraphs of the statement of claim, which have been admitted or not denied in the affidavit of defense:

Paragraph 1:

1. Plaintiff, R. B. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

Paragraph 2:

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

Paragraph 3:

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

Paragraph 4, as qualified by dates:

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania his income tax re-

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turn for the calendar year 1920, and upon the dates appointed by law duly paid to said Collector and to defendant the tax of \$406,673.28, shown by said return to be due to the Government of the United States as follows:

March 15, 1921.....	\$101,668.32
June 17, 1921.....	101,668.32
September 19, 1921.....	101,668.32
December 17, 1921.....	101,668.32

Total	\$406,673.28.
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Paragraph 5:

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of \$175,259.70 was disclosed.

Paragraph 6:

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of \$175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of \$175,259.70, together with interest thereon of \$12,527.47, and threatened to assess and collect additional interest, and make seizures if payment

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should not be made within the specified ten days' time.

Paragraph 7:

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of \$175,259.70 and \$12,527.47.

Paragraph 9:

9. On or about December 12, 1918, plaintiff, his brother A. W. Mellon and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made part hereof and marked Exhibits "A" and "B," respectively.

I offer in evidence the Exhibits "A" and "B" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Paragraph 10, as admitted by the affidavit of defense:

10. Henry C. Frick died on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving

partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

Mr. Eustace:

If the Court please, defendant calls attention to the qualification of the admission of Paragraph 10 of the statement of claim as set forth in Paragraph 10 of the affidavit of defense, similiar to the qualification of Paragraph 10 in the case of A. W. Mellon vs. Heiner, at No. 6980 Law.

Mr. Booth:

The last sentence of Paragraph 11:

11. * * * By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D" respectively.

I now offer in evidence Exhibits "C" and "D" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Eustace:

The offer is objected to, if the Court please, as irrelevant and immaterial, for the reason that it refers to actions of the parties after the year 1920. One of the defenses interposed, and which we hope to sustain,

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is that the tax for the year 1920 is the only tax involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in these cases.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence Paragraph 13, as not being specifically denied:

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

Mr. Eustace:

Defendant objects to that offer, for the reason it is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence the averments of Paragraph 14 of the statement of claim, as not being specifically denied:

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating

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agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

Mr. Eustace:

At this time defendant objects to the inclusion of that part of Paragraph 14 of the statement of claim "during the period of liquidation" in the first line, and in the third line "liquidating trustees", for the reason that they tender conclusions of law and not statements of fact.

The Court:

That objection is overruled for the present. Of course, it requires a later determination of the status of those particular persons named, but it is overruled for the present, subject to an exception.

Mr. Eustace:

Exception, of course.

Mr. Booth:

I offer Paragraph 16, for the same reason:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

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Mr. Eustace:

Same objection to those portions of Paragraph 16 of the statement of claim, in the latter part of the first line and the first part of the second line, the words "while acting in the capacity of liquidating trustees", and the last two words in the third line and first four words of the fourth line, "treating the same as trust properties", for the reason that they are conclusions of law.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 17:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

Mr. Eustace:

Objection is made to the entire paragraph 17 in the statement of claim, for the reason that it is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 18, with the omission of certain words denied by the affidavit:

18. In his return for said year 1920, plaintiff * * * included as taxable profit his undistributed shares of the so-called * * * profits of A. Overholt & Company in the amount of \$48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of \$5,960.55 * * *.

Mr. Eustace:

As to the word "undistributed" in the second line of Paragraph 18 of the statement of claim, that is objected to, as irrelevant and immaterial.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 19:

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from \$48,350.74 and \$5,960.55 as reported on the return to \$281,779.95 and \$52,814.28 respectively.

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Paragraph 20:

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported, although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

Mr. Eustace:

Defendant objects to the admission of Paragraph 20 of the statement of claim, as read, for the reason that it is wholly immaterial and irrelevant to any of the issues in this case.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 21:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

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Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.

Mr. Eustace:

That is objected to, for the reason that the affirmative matter set up by the defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of the statement of claim; and for the further reason that said allegations are wholly irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 22:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation, including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

Mr. Eustace:

To which offer objection is made, for the reason that the last sentence read by counsel is specifically

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denied in the last sentence of Paragraph 22 of the amended affidavit of defense; and for the further reason that the matter alleged in Paragraph 22 of the statement of claim is irrelevant and immaterial.

The Court:

It doesn't seem to be a specific denial of that last sentence.

Mr. Booth:

If the Court please, it is a specific denial in that it uses the exact words of the statement of claim, but under the decisions of Pennsylvania under the Practice Act it does not constitute, in our opinion, as we submit, a specific denial. It may be they did not include all the profits, but they have to go one step further and say whether or not they included any profits. In other words, if I am sued for \$1,000, and I in my affidavit set forth that I did not owe the plaintiff \$1,000, that has been held not to be good; I have to go one step further and say whether I owe him \$800 or whether I owe him nothing. They have not denied that they have not included any of the profits.

The Court:

The objection is overruled for the present, and exception noted.